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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
IDAHO TERRITORY,
FROM JANUARY TERM, 1866, TO SEPTEMBER TERM, 1880,
INCLUSIVE.
By H. E. PRICKETT,
ASSOCIATE JUSTICE.
VOLUME I.—NEW SERIES.

SAN FRANCISCO:
A. L. BANCROFT AND COMPANY,
LAW BOOK PUBLISHERS, BOOKSELLERS, AND STATIONERS.
1882.

Entered according to Act of Congress, in the year 1882,
By A. L. BANCROFT AND COMPANY,
In the Office of the Librarian of Congress, at Washington.

Rec. May 22, 1882

JUSTICES

OF THE

SUPREME COURT,

FROM THE ORGANIZATION OF THE TERRITORY AND DURING
THE TIME OF THESE REPORTS.

CHIEF JUSTICES:

	When Appointed.
HON. SIDNEY EDGERTON.....	March 10, 1863.
HON. SILAS WOODSON.....	July 28, 1864.
HON. JOHN R. McBRIDE.....	February 14, 1865.
HON. THOMAS J. BOWERS.....	July 18, 1868.
HON. DAVID NOGGLE.....	April 9, 1869.
HON. MADISON E. HOLLISTER.....	January 14, 1875.
HON. WILLIAM G. THOMPSON.....	January 13, 1879.
HON. JOHN T. MORGAN.....	June 10, 1879.

ASSOCIATE JUSTICES:

	When Appointed.
HON. ALECK C. SMITH.....	March 10, 1863.
HON. SAMUEL C. PARKS.....	March 10, 1863.
HON. MILTON KELLY.....	April 17, 1865.
HON. JOHN CUMMINS.....	May 29, 1866.
HON. RICHARD T. MILLER.....	July 1, 1868.
HON. JOHN R. LEWIS.....	April 15, 1869.
HON. WILLIAM C. WHITSON.....	July 12, 1870.
HON. MADISON E. HOLLISTER.....	March 20, 1871.
HON. JOHN CLARK.....	January 14, 1875.
HON. HENRY E. PRICKETT.....	January 19, 1876.
HON. NORMAN BUCK.....	January 27, 1880.

OFFICERS
OF THE
SUPREME COURT,
FROM THE ORGANIZATION OF THE TERRITORY.

CLERKS:

	When Appointed.
A. L. DOWNER.....	June 9, 1864.
WILLIAM J. YOUNG.....	March 31, 1866.
SOL. HASBROUCK.....	March 1, 1868.
DON. L. NOGGLE.....	July 5, 1869.
THOMAS DONALDSON.....	May 11, 1871.
WILLIAM D. HUGHES.....	January 4, 1872.
EDWARD C. STERLING.....	February 4, 1872.
ALONZO L. RICHARDSON.....	March 26, 1872.

UNITED STATES MARSHALS:

	When Appointed.
DOLPHUS S. PAYNE.....	March 13, 1863.
JAMES H. ALVORD.....	April 17, 1865.
JOSEPH PINKHAM.....	March 25, 1870.
EBEN. E. CHASE.....	May 10, 1878.

UNITED STATES ATTORNEYS:

	When Appointed.
GEORGE C. HOUGH.....	February 29, 1864.
JOSEPH W. HUSTON.....	April 19, 1869.
NORMAN BUCK.....	May 10, 1878.
JAMES B. BUTLER.....	May 17, 1880.
WALLACE R. WHITE.....	May 20, 1881.

ATTORNEYS

AND

COUNSELORS AT LAW,

LICENSED AND ADMITTED FROM THE ORGANIZATION OF THE
TERRITORY TO THE SEPTEMBER TERM, 1881.

	Date of Admission.
ADAMS, GEORGE W.....	September 20, 1880.
AINSLIE, GEORGE.....	June 6, 1866.
ANDERSON, V. S.....	January 7, 1867.
BARBOUR, CLITUS†.....	January 12, 1871.
BEATTY, E. T.....	January 11, 1869.
BENNETT, T. W.†.....	February 24, 1872.
BOWEN, A. O.†.....	February 24, 1869.
BRAYMAN, M.†.....	January 17, 1877.
BROWN, JONAS W.....	January 23, 1869.
BRUMBACK, JEREMIAH.....	January 5, 1869.
BUCK, NORMAN.....	September 1, 1879.
BURMESTER, THEODORE†.....	June 1, 1866.
CAHALAN, T. D.....	February 29, 1872.
CATON, N. T.†.....	June 7, 1866.
CHAPMAN, THOMAS†.....	January 5, 1871.
COMBS, JOSEPH†.....	June 2, 1866.
CRAWFORD, WILLARD.....	September 15, 1880.
CURTIS, E. J.....	May 31, 1866.
DAVENPORT, W. H.†.....	June 11, 1866.
DONALDSON, THOMAS†.....	September 21, 1869.
DOUTHITT, D. W.†.....	June 8, 1866.
EDMONDSON, P. E.†.....	January 11, 1869.
ENSIGN, FRANCIS E.....	January 16, 1867.
FENN, S. S.....	January 3, 1871.
FOOTE, R. E.*.....	June 13, 1866.
GANAHL, FRANK.....	August 6, 1866.
GEORGE, WYATT A.†.....	June 1, 1866.
GILBERT, GEORGE I.†.....	January 7, 1867.
GRAY, JOHN S.....	February 18, 1871.

* Deceased.

† Removed from the Territory.

	Date of Admission.
HASBROUCK, SOL.....	February 20, 1871.
HAWLEY, JAMES H.....	February 14, 1871.
HEED, ALBERT.....	May 31, 1866.
HENLY, JOHN C.*.....	June 4, 1866.
HIGBEE, L. P.†.....	August 19, 1869.
HOLBROOK, E. D.*.....	January 24, 1870.
HOUGH, GEORGE C.†.....	August 6, 1866.
HOWARD, SILAS L.†.....	January 5, 1869.
HUGGAN, ANDREW*.....	August 6, 1866.
HUSTON, J. W.....	July 7, 1869.
ISAACS, A. C.*.....	January 19, 1867.
ISHAM, A. E.†.....	January 2, 1871.
JOHNSON, RICHARD Z.....	August 20, 1867.
KELLY, MILTON.....	January 15, 1872.
KELLY, WILLIAM*.....	January 17, 1871.
KINGSLEY, C. S.....	January 12, 1878.
LANDESMAN, JOHN†.....	May 31, 1866.
LARABEE, CHARLES H.†.....	June 9, 1866.
LAW, WILLIAM, JR.†.....	May 31, 1866.
LELAND, ALONZO.....	January 2, 1872.
LEWIS, J. R.†.....	January 2, 1872.
LINDSAY, R. H.†.....	January 19, 1869.
MARGARY, H. W. O.†.....	June 12, 1866.
MARTIN, HENRY.....	June 17, 1867.
MAY, J. J.†.....	January 9, 1868.
McBRIDE, JOHN R.†.....	—————
McDANIEL, EDWARD H.†.....	January 5, 1869.
McGRAW, E. W.†.....	June 8, 1866.
McQUAID, JOHN A.†.....	August 20, 1867.
MERRITT, SAMUEL A.†.....	June 11, 1866.
MILLER, FRANKLIN†.....	June 14, 1866.
MILLER, JOSEPH†.....	June 1, 1866.
MORELAND, J. C. N.†.....	August 22, 1867.
NUGENT, EDWARD.....	January 15, 1867.
ONDERDONK, J. L.....	September 6, 1881.
PRESTON, H. L.†.....	May 31, 1866.
PRICKETT, H. E.....	June 14, 1866.
REED, CHARLES H.....	September 22, 1880.
REYNOLDS, JAMES S.†.....	June 1, 1866.
ROSBOROUGH, J. B.†.....	June 5, 1866.
RUICK, NORMAN M.....	September 20, 1880.

* Deceased.

† Removed from the Territory.

	Date of Admission.
SCANIKER, S. P.†.....	January 15, 1867.
SIDEBOTHAM, R. A.....	January 25, 1875.
SIMS, C.*.....	June 7, 1866.
SMITH, ALANSON.....	January 13, 1873.
SMITH, I. N.*.....	June 1, 1866.
STOUT, JAMES.....	January 14, 1873.
WAITE, C. B.†.....	June 7, 1866.
WELDY, SETH†.....	January 9, 1868.
WHITE, WALLACE R.....	September 5, 1881.
WILLIAMS, P. L.†.....	September 13, 1880.
WILLSON, BEN.....	January 13, 1873.
WOOD, FREMONT.....	September 13, 1881.

* Deceased.

† Removed from the Territory.

PREFACE.

THE territory of Idaho was organized by the act of congress, approved March 3, 1863. The ninth section of that act vests the judicial power of the territory in a supreme court, district courts, probate courts, and justices of the peace. The supreme court consists of a chief justice and two associate justices, who are required to hold a term at the seat of government of the territory, annually. The territory is divided into three judicial districts, and a district court is held in the several organized counties of each district, by one of the justices of the supreme court.

The first term of the supreme court of Idaho was held in Boise city, the seat of government of the territory, commencing in January, 1866. In the year 1867, a small volume of the decisions rendered was published, and called Volume 1 of Idaho Reports; but as these decisions are now out of print, the act of the legislature, approved December 28, 1880, authorizing the publication of this volume, provides that it shall contain all the decisions of the court from its organization to the present time; and, to distinguish it from the volume above referred to, the act provides that this shall be known as Volume 1, New Series.

It is to be regretted that the decisions of our supreme court have not before been made public, in an authentic and durable form; not only because the public interests and the spirit of public discussion and of freedom of inquiry require that everything that so closely concerns the community should be known and understood; but for the further reason, that we now find the decisions so voluminous, that in order to include them in one volume, as provided by the act of the legislature, we find it necessary, to avoid making it too cumbersome, to omit the numerous dis-

senting opinions and the greater portion of the briefs and arguments of counsel; and the learning and eloquence displayed in many of the written arguments on file, are thus lost.

The want of reports of the decisions of our supreme court has long been felt by the profession, and it is gratifying to know that from considerations of public benefit, the legislature has been induced to pass a law under which that want is now supplied.

The pressure of official duties has prevented the reporter from completing the work for the printer as early as he desired, and if he is entitled to any praise, it must be founded on the accuracy with which it has been performed; and we must remain content with the hope, that, in this respect, the result of our labors will be found not entirely wanting.

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RULES OF THE SUPREME COURT

OF THE

TERRITORY OF IDAHO.

RULE I.

Attorneys, admitted otherwise than upon examination, must appear personally in court at the time the motion for their admission is made; and in no case will any person be admitted to practice except he appear in open court, when a motion shall be made for that purpose. Applicants, when admitted, shall sign a roll, and take the oath of office, prescribed, upon admission to this court, viz.: "I ———, do solemnly swear (or affirm, as the case may be), that I will demean myself as an attorney and counselor of this court, uprightly and according to law, and that I will support the constitution of the United States and the organic act of the territory of Idaho."

RULE II.

When an appeal or writ of error has been perfected thirty days before the commencement of the next regular or adjourned term of this court, the transcript of the record shall be filed at least three days before the first day of such regular or adjourned term.

RULE III.

If the transcript of the record be not filed within the time prescribed, the appeal or writ of error may be dismissed, on motion, during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored, the dismissal shall be final, and a

bar to any other appeal or writ of error from the same order or judgment.

RULE IV.

On such motion there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment, the date of its rendition, the fact and date of the filing of the notice of appeal or issuing of the writ of error, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears, the fact and date of the filing, the undertaking on appeal or writ of error, and that the same is in due form; the fact and time of the settlement of the statement, if there be one; and, also, that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record; or if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

RULE V.

All transcripts of records hereafter sent to this court shall be on paper of uniform size, according to a sample to be furnished by the clerk of the court, with a blank margin one and one half inches wide at the top, bottom, and side of each page, and the pleadings, proceedings, and statement shall be chronologically arranged. The pages of the transcript shall be numbered, and shall be written only upon one side of the leaves. Each transcript shall be prefaced with an alphabetical index to its contents, specifying the page of each separate paper, order, or proceeding, and of the testimony of each witness, and shall have at least one blank, fly-sheet cover. Marginal notes of each separate paper, order, or proceeding, and of the testimony of each witness, shall be made throughout the transcript. The transcript shall be fastened together on the left side of the pages, by ribbon or tape, so that the same may be secured and every part conveniently read. The transcript shall be written in a fair, legible hand, and each paper or order shall be separately inserted. No record which fails to conform to these rules shall be received or filed by the clerk of the court.

RULE VI.

For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same in writing to this court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VII.

The calendar of each term shall consist only of those cases in which the transcript shall have been filed on or before the Thursday preceding the first day of the term, unless upon written consent of the parties, or for good cause shown, it shall be otherwise ordered by the court. *Provided*, That in all cases in which the appeal is perfected or writ of error issued, as provided in rule second, and the transcript is not filed as by said rule prescribed, the case may be placed upon the calendar on motion of the respondent or defendant in error, for the purpose of being dismissed upon the certificate of the clerk, as provided by Rule IV, or for the purpose of having the case heard upon its merits, or for the purpose of having the judgment affirmed with or without damages, upon the filing of the transcript.

RULE VIII.

Causes from the same judicial district shall be placed together, and the causes shall be set on the calendar in the order of the several districts, commencing with the first, except that causes in which the people of the territory are a party, shall be placed at the head of the calendar.

RULE IX.

Exceptions to the transcript, statement, the bond or undertaking, on appeal or writ of error, the notice of appeal, or to its service, or any objection to the record, affecting the rights of the appellant or plaintiff in error, to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writ-

ing, and filed at least one day before the argument, or they will not be regarded. In such case the objection must be presented to the court before argument on the merits.

RULE X.

Upon the death or other disability of the party, pending an appeal or writ of error, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or of any party to the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

RULE XI.

On a call of the calendar in its order, if no counsel appear for the appellant, or plaintiff in error, and no brief or statement of points and authorities on behalf of appellant or plaintiff in error be on file, the appeal or writ of error will be dismissed, or judgment affirmed, in the discretion of the court, on motion of respondent or defendant in error.

RULE XII.

In all cases where notice of motion is necessary, unless for good cause shown, the time is shortened by an order of the court, or one of the justices thereof, the notice shall be three days, and when served away from the place of holding court, one day in addition for every twenty-five miles travel.

RULE XIII.

No more than two counsel on a side will be heard upon the final argument, except in peculiar and important cases, upon leave of the court obtained before the argument is commenced; but each defendant who has appeared separately in the court below may be heard through his own counsel. The counsel for the appellant or plaintiff in error shall be entitled to open and close the argument. Each side will be allowed two hours, including the reading of papers, and each defendant who has appeared separately in the court below will be allowed two hours. *Provided*, That for good cause shown, the court may give further time for the argument, and each party shall also have the privilege of filing a printed brief or argument. Upon the argument

of preliminary motions no more than one counsel on a side will be heard, and only one hour to each counsel will be allowed.

RULE XIV.

When a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted with the remittitur to the court below.

RULE XV.

No paper filed in a cause shall be taken from the court room or clerk's office, except by order of the court or one of the justices.

RULE XVI.

When causes are placed upon the calendar, parties shall be primarily liable for costs, as follows: 1. If by the appellant or plaintiff in error, he shall be first liable; 2. If by the respondent or defendant in error, then both parties. In no civil case shall the clerk be required to remit the final papers until the costs are paid.

RULE XVII.

In civil causes each party shall prepare and have printed an argument or brief of the points and authorities relied on. Briefs on both sides shall begin with a succinct statement of so much of the record as is essential to the questions discussed in them, referring to the transcript by page; and sufficient to dispense with the reading of the transcript on the argument. The brief of the appellant or plaintiff in error shall also contain a distinct enumeration of the several errors relied on. The costs of such brief, at not exceeding two dollars per page of seven by three and one half inches printed matter, and for not exceeding twenty pages, shall be allowed and taxed as costs; *provided*, that no costs shall be taxed for any brief which does not comply with this rule, or containing miscitation of authorities, unless corrected before the submission of the case.

RULE XVIII.

Briefs shall be neatly and legibly printed with black ink on white writing paper, properly paged at the top, with a

margin on the outer edge of the page of an inch and a half. The printed page shall be seven inches long and three and a half inches wide, and the paper page shall not be more than nine inches long or seven inches wide. Each brief shall be signed by counsel preparing it; and shall be fastened together in a paper or cloth cover, with the title of the cause printed on the outside.

RULE XIX.

Briefs must be served on the opposite party at least two days before the cause is called for argument. Either party may, however, at any time before the argument, file and serve a supplemental brief confined to reply to the brief of the other side.

RULE XX.

Before, or at the time of the calling of a cause for argument, both parties shall file with the clerk at least five copies of their briefs for the justices of the court, the clerk, and the reporter; and when the cause is called, the clerk shall furnish a copy thereof to each of the justices.

RULE XXI.

Causes may be submitted on either or both sides, on printed briefs actually filed at the time. But the court will order an argument, on both sides, of all cases appearing to require it.

RULE XXII.

When a cause is reached on the calendar, and neither side has been submitted or is represented by counsel in court, under these rules, the appeal will be dismissed. When it is so submitted or represented by counsel for the appellant or plaintiff in error, and not by the respondent, or defendant in error, the judgment, order, or proceeding of the court below will be reversed, of course, without argument. When it is so submitted or represented by counsel for the respondent or defendant in error, and not for the appellant or plaintiff in error, the judgment, order, or proceeding of the court below will be affirmed, of course, without argument, unless the court in its discretion shall see fit to examine the record and render its judgment on the merits.

RULE XXIII.

In all cases when an appeal or writ of error is manifestly for delay, damages may be allowed at the rate of not exceeding twelve per cent. upon the amount of the judgment, in the discretion of the court.

RULE XXIV.

A syllabus of the points decided by the court in each case, shall be stated in writing by the judge assigned to deliver the opinion of the court.

RULE XXV.

The regular term of this court shall commence on the first Monday in September, annually, and such adjourned terms shall be held as the court may order; and the court shall cause to be entered of record from time to time when the adjourned term will be held.

RULE XXVI.

The chief justice, when present, shall preside over the supreme court, and all decisions and business shall be declared by him, or under his direction; reserving the right of either judge to deliver his separate opinion to any matter decided by the court.

RULE XXVII.

All motions and proceedings, and all arguments thereon, preliminary to an argument on the merits of a case, must be made or had during the first week of each term.

RULE XXVIII.

All motions for a rehearing shall be upon petition in writing presented within five days after the judgment or order made by the court, and before the adjournment of the court for the term, and no argument will be heard thereon.

No remittitur or remandate to the court below shall be issued until after the expiration of ten days from the entry of judgment, and all decisions upon petitions for rehearing shall be made before the adjournment of the term.

RULE XXIX.

The time prescribed by these rules, for any act, except

for making a motion for rehearing, may be enlarged by the court for cause, on motion.

RULE XXX.

In cases where no provision is made by statute, or by these rules, proceedings in this court shall be in accordance with the practice heretofore existing.

RULE XXXI.

These rules shall take effect on the first day of January, 1882, and thereupon all former rules of practice in this court heretofore adopted, shall cease to be in force. But rules of practice established in the decisions of the court shall remain in force as heretofore.

IDAHO REPORTS.

VOL. I.—NEW SERIES.

ERRATA.

On page 180, line 11, for "promise" read "premise."

On page 205, line 29, for "I do dissent" read "I do not dissent."

On page 208, line 23, for "particular suggestions" read "particulars suggested."

On page 209, line 22, for "inconsistencies" read "circumstances."

On page 221, line 23, for "we" read "he."

On page 241, seventh line from bottom, for "1838" read "1868."

On page 251, lines 8 and 9, for "review" read "renew."

On page 253, seventh line from bottom, for "inadequate" read "inequitable."

On page 264, tenth line from bottom, for "comments" read "averments."

On page 287, seventh line from bottom, for "appear" read "appeal."

On page 293, sixth line from bottom, between "to" and "Cole's" read "purchase."

On page 331, line 18, for "law" read "land."

On page 349, eleventh line from bottom, for "receiver" read "recorder."

On page 361, line 5, for "ten" read "two."

On page 366, line 5, for "Whart." read "Wheat."

On page 380, line 29, for "county" read "country."

On page 381, eighth line from bottom, for "84 Id." read "34 Id."

On last line of page 394, and first line of page 395, read "*H. E. Prickett*, for the defendant William Bryon, moved" etc.

On page 398, line 18, for "and" read "aid."

On page 399, ninth line from bottom, for "occurred" read "accrued."

On page 411, line 3, for "possessing" read "possessory."

On page 425, second and third lines from bottom, for "compromising" read "comprising."

On page 462, line 8, for "move" read "more."

On page 473, line 3, for "would" read "should."

On page 477, line 22, for "setting" read "settling."

On page 501, line 27, for "practice" read "justice."

On page 539, for first syllabus, substitute the following: "BILLS OF REVIEW.—A bill of review to reverse a decree erroneous upon its face, by analogy to the time for taking appeals, must be filed within one year from its enrollment, and the same rule applies to a bill brought for the same purpose where the decree itself shows no error, but which error is afterwards discovered when the same period of time has elapsed after the error was discovered."

On page 542, line 7, for "prevented" read "presented."

ERRATA.

On page 558, lines 24 and 25, for "one thousand five hundred" read "fifteen thousand."

On page 610, line 4, for "by" read "of."

On page 621, line 4, after "Third," read "denying" etc.

On page 661, line 21, for "prevented" read "presented."

On page 661, line 22, for "contented" read "contended."

On page 666, line 9, for "such" read "each."

On page 667, line 16, for "admit" read "permit."

On page 692, line 1, for "section" read "session."

On page 729, line 5, for "finds" read "provides."

On page 729, line 7, after "plaintiff" read "an undertaking" etc.

On page 733, line 16, for "recovering" read "reversing."

On page 733, line 29, for "unrecovered" read "unreversed."

On page 740, line 2, for "pledge" read "pledgee."

On page 747, line 10, for "court" read "count."

On page 756, line 27, after "records" read "which," etc.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

JANUARY TERM, 1866.

PRESENT:

HON. JOHN R. McBRIDE, CHIEF JUSTICE.

HON. MILTON KELLY, } JUSTICES.
HON. ALECK C. SMITH, }

J. B. BLOOMINGDALE, RESPONDENT, *v.* B. M. DU RELL
& CO., APPELLANTS.

SEVERAL JUDGMENT.—When a plaintiff establishes a cause of action against one or more of the defendants in an action for a tort or on a contract, and it appears in the latter case that the defendants were not joint contractors, or jointly liable, he is entitled to a judgment against those against whom he establishes his cause of action.

ADMISSIONS CONTAINED IN PLEADINGS.—Written admissions of the defendants in their original answer are still admissions tending to establish the facts thus admitted, and are as much evidence to be considered as any other admissions, notwithstanding they were stricken out on defendants' own motion.

RECEIPTING FOR GOODS "IN GOOD ORDER" NOT CONCLUSIVE.—The fact that plaintiff received goods without objection, and receipted for the same as in good order, raises a strong presumption in favor of defendant, but does not amount to an absolute defense to an action to recover for damage to goods while in the hands of the defendants as common carriers.

APPEAL from the second judicial district, Boise county.

Opinion of the Court—McBride, C. J.

C. B. Waite, for the appellant.

May & McGraw, for the respondents.

McBRIDE, C. J., delivered the opinion of the court, SMITH, J., and KELLY, J., concurring.

This was an action brought against B. M. Du Rell & Co., who were charged in the complaint to be a firm composed of three defendants, to wit, B. M. Du Rell, William B. Hughes, and Edward Webb, to recover damages for injuries done to goods placed in possession of the defendants, who are alleged to be common carriers, for the purpose of transportation from the town of Umatilla, Oregon, to Idaho City, in the territory of Idaho.

The complaint is in the usual form, and the summons and complaint were duly served on all the defendants. At the February term of the district court, the defendants appeared and answered, denying that one of the defendants, Webb, was a partner in the fast freight line, or had anything to do with the transportation business of Du Rell & Co. They proceed then to deny that the goods were delivered as stated in the complaint, and alleged, for a special defense, that they, to wit, the firm of Du Rell & Co., did receive certain goods of the plaintiff at the time and place charged, for transportation to Idaho City for plaintiff, that the goods were transported to that point, and by the agent of the defendants delivered to the plaintiffs, who receipted for them in good order without objection, and that no damage to said goods was known to defendants at the time of the delivery, or claimed by plaintiffs.

Upon this answer the issue was tried in the court below. It appears, however, that when the case was called for trial, or at some other time, precisely when does not appear, the defendants asked leave to and were permitted to strike out of their answer certain portions which went to explain how the damage done to the goods occurred, and to show that the same was done by the action of the elements, and not by their neglect. No replication to the new matter set up being required by our statute, the case was heard and de-

Opinion of the Court—McBride, C. J.

cided on the issue made in the complaint and answer. The latitude which this practice gives to litigants on a trial is well illustrated in this case, and we think shows the baneful effect of the repeal of that clause of the practice act which provides for a replication in proper cases. Such a pleading in this case would probably have narrowed the issue on the trial to one or two points, whereas the parties now are contending in this court that the issue embraced almost every fact alleged in the complaint.

The testimony showed that the defendants brought on their freight line in the month of November, 1865, which was owned by the defendants, Du Rell and Hughes only, from Umatilla, Oregon, to Idaho City, six thousand five hundred cigars and delivered them to plaintiffs; that when they arrived they were very wet and in anything but a merchantable condition; that they were received by the plaintiffs without objection, and taken away; that as soon as they were opened by plaintiffs, the agent of defendants was notified that they were damaged, and came and examined them. The agent told the plaintiffs that he was informed by the driver on the freight line that the goods had been unloaded in the snow and might have got wet at that time. The agent refused to receive the goods back on the application of the plaintiffs. The course of business at the office of the freight line seems by the testimony to have been for consignors to receipt for their goods in good order on the company's books, or open them in their presence if damaged, or take them away under protest. Proof was also given to show the extent of the damage and the difference between the value of the goods as received and a good article.

The court below—a jury being waived—found a verdict in favor of the plaintiffs for four hundred and fifty-five dollars damages, and rendered a judgment for that amount, and costs, against the defendants, who moved thereupon for arrest of judgment and a new trial, which being overruled the defendants appeal to this court.

The errors assigned are:

1. That this was a joint action against the defendants, Du Rell, Hughes, and Webb, as composing the partnership

Opinion of the Court—McBride, C. J.

firm of Du Rell & Co.; that the judgment is against Du Rell and Hughes, and therefore variant from the complaint and erroneous.

2. That the evidence showing that the goods were receipted for in good order and carried away by the plaintiffs without objection precluded them from afterwards claiming damages, and that the evidence was insufficient to sustain the findings of the court.

The facts in this case show that the defendants are common carriers; that they were engaged in the business of freighting generally between the points named in the complaint, and are subject to all the responsibilities and liabilities of persons engaged in that business. The legal liability of the defendants to pay damages, if the facts supported the complaint, seems not to have been seriously questioned either in the district court or on the hearing, and this relieves us of any labor in showing the application of the law of common carriers to the facts of this case.

The first question for decision is the one raised as to parties. This suit was brought against the defendants, Du Rell, Hughes, and Webb. In the answer on file, which is sworn to by one Brown as agent of the defendants, Webb is declared to have no interest in the fast freight line, nor in the partnership which owns it, and the evidence set out in the statement fully sustains that averment. This being shown, the question recurs whether if the plaintiffs show that the facts set up as to Du Rell, Hughes, and Webb are true only as to the two first, can they have a judgment in accordance with the facts as they are developed at the trial?

The rule that joint contractors must be sued at the same time has its origin in a purpose of the law to protect the rights of such persons in their relations with each other. If all contract together, it is but fair that all should be called upon for fulfillment of the contract, that the burden may be placed upon them at the same time, that perfect equality at least of liability may be preserved.

The primary reason for this is, that a joint contract presupposes joint resource for its discharge, and although this does not affect the personal liability of each one, the equity

Opinion of the Court—McBride, C. J.

of the transaction would imply that they should be first resorted to, and in order that this may be done, the law provides that joint contractors, if known, shall be sued simultaneously, and if the plaintiff fails to join one who is a proper party the defendant may plead it in defense. If in this case the defendant Webb had been a proper party, but the plaintiff had failed to bring him in, the defendants who were brought in might have urged that defense to the action, and compelled the plaintiff to make all the parties with whom he contracted liable, or defeat his recovery against any, and for the good reason that to allow a recovery against two when the burden was by the contract imposed on three, would change the contract and increase the burden of those sued.

But the reason for this rule ceases to apply in a case like the present. If Du Rell and Hughes really made the contract with plaintiffs, and are bound to pay them damages on a proper showing against them, then while a joinder of Webb might well be complained of by him, it could furnish no ground of complaint to these defendants. It would not change their liability nor increase its burdens. They remain as they were before. There is this well-recognized distinction since the code, between the effect of non-joinder of parties defendant and a misjoinder. While in New York the judges (as in the case of *Bridge v. Payson*, referred to in *Van Santvoord on Pleading*, vol. 1, p. 161) all held that the rule of the common law in case of a non-joinder of defendants had not been changed by the code, yet it was held that whenever a plaintiff establishes a cause of action against one or more of the defendants in an action for a tort or on contract, and it appears in the latter case that the other defendants were not joint contractors or jointly liable, he is entitled to a judgment against those against whom he established his cause of action; so held in an action upon a joint and several bond executed by the defendants to the people under the excise law (*People v. Crane*, 8 How. 151; *Bonstead v. Vanderbilt*, 21 Barb. 26), and making a clear distinction between the effect of a non-joinder and a misjoinder of parties defendant. A defect in

Opinion of the Court—McBride, C. J.

the former would defeat a plaintiff's right to recover, both at common law and under the code; the latter would be fatal at common law, but not so under the code. (Van Santvoord Pl., vol. 1, p. 161.) The case of *Rowe v. Chandler*, cited by the appellants in the argument, does not go the length of this case, but the spirit of the reasoning of the learned judge in that case is in entire accord with our own conclusions.

We can not conceive that any hardship would result from this rule. In this case, the defendants made their plea in abatement as to Webb, and had the benefit of a full hearing on the merits of their own defense, and we do not understand that there is any pretense that it would or could have been different on the merits if this suit had been against the appellants alone. Their answer must have been precisely the same, and having once tried their real case on an issue made by themselves, we do not perceive the justice or the legality of granting them the privilege a second time. They, in fact, come into court insisting that they two are the only persons liable, if any liability exists, to plaintiffs, and when the court takes them at their word and tries the case on the showing they make, turn about and complain because judgment is entered in harmony with their own pleading. This is, we think, scarcely accordant with that spirit of justice which the courts should be solicitous always to follow.

3. The next ground of error assigned is that the evidence was insufficient to justify the findings of the court below. This question is to be determined in a great measure by the effect which is to be given to the pleadings. The defendants undoubtedly intended to put the plaintiffs to the proof of all material allegations of the complaint, and yet we think they could scarcely claim so much. They deny that they were partners (as alleged by complaint) in the fast freight line, and yet admit that the defendants, Du Rell and Hughes, against whom judgment is rendered, and who appeal, are partners and owners of said line. They deny that they received the goods mentioned in complaint in the "manner and form" alleged, and yet admit that they

did receive certain goods of about the quality and description alleged, and did undertake to carry the same from Umatilla to Idaho City. They deny the market value of the goods and the charge of negligence, etc.

Under these pleadings, what in fact have the plaintiffs to prove? Not that the defendants, Du Rell and Hughes, are owners of the fast freight line between Umatilla and Idaho City—that fact is admitted; not that the defendants undertook to receive and carry certain goods on their line for the plaintiffs—that is also admitted; not that those goods were carried by defendants to Idaho City, and were wet and in bad condition on arrival—that is not denied, and is therefore admitted.

The defendants then say and admit that they are common carriers; that they undertook to carry the goods; that they did carry and deliver them, and when delivered they were wet and in bad condition. Now, what do those admissions leave for the plaintiffs to prove? Simply the condition in which the goods were delivered to the defendants, and the difference between their value as thus received by them and their value on delivery at Idaho City, in a wet and bad condition. While defendants deny the damage generally, there is no such denial as entitled them to dispute the amount of damages, if any is shown; this we understood the counsel of the appellants to concede in the argument.

Now, what did the plaintiffs prove? They established the value of the goods when received, and proved the difference between that value and the price of an undamaged article. They proved by the defendants' own admissions in their original answer that the goods were damaged in defendants' hands while *in transitu*; that they were unloaded in the snow and were exposed to the action of the elements to such a degree that they were dripping with wet when they arrived. They could not appear in the wet and damaged condition they were in on their delivery to the plaintiffs at Idaho City, if that condition had not resulted from the action of the weather while in defendants' hands. Would not the court or a jury be amply justified in inferring that the damage proved was the result of their having been wet

Opinion of the Court—McBride, C. J.

in the hands of the defendants, when there is no testimony to show that they were exposed at any other time. The only evidence on the point tended to establish this inference, and, as it was all the evidence, the court was bound to adopt the inference or disregard the plain rule of law in civil cases, that the weight of evidence controls the conclusion.

In addition to this testimony, there were the written admissions of the defendants in their original answer, when they undertake to explain the condition of the goods on arrival by saying "that it was owing to the inclemency of the weather, the bad condition of the roads, the necessity of unloading the goods, and their consequent exposure." It will not do to say that these matters of excuse or discharge were struck out of the answer, and should not have been considered. They were still admissions tending to establish that the goods were received in good order and were damaged *in transitu*, and were as much evidence to be considered as any other admissions. It is true that the fact that they were repudiated by the defendants striking them out may show that they were made under a misapprehension; but as the fact of that repudiation, like any other correction of an error in statement, was as fully before the court as the original admission itself, it was a proper matter for the consideration of the judge, and he no doubt reached the right conclusion.

In *Hirschfeld v. Franklin*, 6 Cal. 607, the defendant made cognovit for the sum of one thousand seven hundred dollars. Afterwards, on a suit brought for the sum, the cognovit having been lost by fire, the defendants' answer denying the cause of action, it was held that the cognovit was good as an admission *in pais*, and that upon such evidence the plaintiff was entitled to recover.

If the defendants had admitted the facts set up in the answer, and afterwards stricken out on their own motion, to a party out of court, the plaintiff could certainly have introduced the witness and proved the statements. And can any good reason be given why the same admissions deliberately made, and yet upon record, though not in the issue, are not just as proper for the consideration of the court

Argument for Respondents.

or jury trying the cause, as if they had been shown the court *dehors* the record?

There is another consideration urged by the defendants which we think has in it much of the elements of a good defense, which is that the goods were received without objection by the plaintiffs, receipted for as in good order, and taken away. Undoubtedly this raises a strong presumption in defendants' favor; still it does not amount to a defense absolutely. In many, and indeed we think in most cases, it would establish the innocence of a common carrier as to the damage complained of; yet it is only a presumption in his favor—only evidence which the complainant must overcome, and which he may meet and explain. In this case it seems to have been fully met by the evidence as to the condition of the goods on arrival, and the fact that immediate notice was given of the injuries and damage complained of, and the further fact that by the course of business at the office of the defendants, parties receiving goods receipted in a book kept for the purpose, which imported in terms that they were in good condition. Failing to do this, they were compelled to open them in the office. This explains why the goods were receipted for in good order by the plaintiff, when they were evidently in a badly damaged condition.

Taking the facts all together, we think the findings of the court below fully sustained by the evidence. We therefore affirm the judgment with costs.

C. JACOBS & CO., RESPONDENTS, v. J. J. DOOLEY & CO.,
APPELLANTS.

IMPEACHING VERDICT—AFFIDAVIT OF JUROR.—The verdict of a jury may not be impeached by the affidavit of a juror.

APPEAL from the second judicial district, Boise county.

Rosborough & Waite, for the appellants.

May & McGraw, for the respondents.

The affidavit of a juror can not be used to impeach a verdict. (4 Abb. N. Y. Dig., p. 139, secs. 219–226.)

Opinion of the Court—Kelly, J.

KELLY, J., delivered the opinion of the court, McBRIDE, C. J., and SMITH, J., concurring.

This is an action upon a promissory note for the recovery of three hundred and thirty dollars and seventy-one cents. The defendants by their answer admit the execution of the note, but say the same was not stamped with United States revenue stamps; and they further answer that the note was given upon closing up an account; that the account was made up by plaintiffs in the absence of defendants' books, and that there was a mistake in settling said account in defendants' favor in the sum of two hundred and forty dollars, and ask to be relieved of said mistake, and that the plaintiffs may have judgment for ninety dollars and seventy-one cents only.

The plaintiffs in their replication deny that there was any mistake in settling said account in defendants' favor, but say that such mistake was in favor of plaintiffs in the sum of one hundred dollars, for which they ask nothing. They also state that said note was given to their agent, James Mullany, who immediately placed a revenue stamp thereon.

The statement in this case showed that the book accounts of each of the parties was given in evidence to the jury; and the plaintiffs claimed that their evidence showed the mistake to be in their favor in the sum of one hundred dollars more than they had claimed in the complaint. The defendants claimed on their part that the evidence showed the mistake to be in favor of the defendants in the sum of two hundred and ninety-three dollars, whereupon the court ordered the plaintiffs to amend their complaint by adding one hundred dollars; and the defendants should amend their answer by adding two hundred and ninety-three dollars, to all of which there were no exceptions taken by defendants. The jury upon the evidence found for the plaintiffs in the sum of four hundred and thirty dollars and seventy-one cents.

The defendants seek to reverse the verdict in this case on the ground of misconduct of the jury, and that the evidence is not sufficient to support the verdict. The fact that the note was stamped and the stamp canceled immediately after its receipt by plaintiffs' agent, Mullany, and before its delivery to plaintiffs, is conceded by defendants' counsel,

Opinion of the Court—Kelly, J.

and of course disposes of that question. The affidavit of one of the jurors is the only evidence relied on to show misconduct of the jury. The affidavit is a very extraordinary one, and if taken as true shows that the juror was under duress by the other jurors in making up his verdict. The jury while deliberating upon their verdict were under the charge of an officer and within hearing of the court. No complaint was made to the officer, and when the jury rendered their verdict no such facts were intimated to the court. Had the juror claimed protection from the officer, or made known his grievances to the court when he came in to render his verdict, he would certainly have been protected. It is hardly possible to suppose that a jury guarded by an officer, and within the hearing of the court, could place any one of their number under such great fear as is pretended by this juror, without his making it known to the officer, or having the courage to explain his verdict to the court at the time of rendering it. The weight of authorities does not permit jurors to impeach their own verdict. There was no reason for this juror's being under duress or any fear of harm while deliberating upon his verdict, and the court below very properly disregarded his affidavit upon a motion for a new trial. The account books of both plaintiffs and defendants were submitted and passed upon by the jury, together with the evidence of one of the defendants in regard to their entries and manner of keeping accounts. The jury passed upon the original indebtedness as they had a right to do, and no exceptions were taken by defendants. They found the plaintiffs' account to be correct, and disregarded entries made in defendants' cash-book, of which the defendants complain.

If the defendants were unable to impress the jury with the correctness of their own books, this court will not disturb the verdict. The court below ordered the complaint and answer amended in accordance with the testimony submitted. The defendants had the full benefit of these amendments, and took no exceptions, and they were so considered for the purposes of the judgment which the jury might render.

The judgment of the court below must be affirmed.

Opinion of the Court—McBride, C. J.

**THE PEOPLE, RESPONDENTS, v. B. M. DU RELL & CO.,
APPELLANTS.**

ERRORS APPARENT FROM THE RECORD.—The party appealing brings his whole case before the appellate tribunal, and the whole record is there for review, and he may challenge any part of it as erroneous.

WAIVER OF RIGHTS IN CRIMINAL CASES.—In a criminal case, a party does not waive his rights by not insisting upon them, and if the court had no jurisdiction by law to try the case, it is not cured by the party failing to claim his right to be dismissed.

JURISDICTION OF PROBATE COURTS.—The probate courts of this territory have not jurisdiction of cases for the punishment of offenders under the license laws.

JURISDICTION OF DISTRICT COURTS, HOW ACQUIRED IN CRIMINAL CASES.—The district courts can acquire jurisdiction of cases for the punishment of violations of license laws in two ways only: First, by the regular intervention of a grand jury; and, second, by appeal from justices' courts.

APPEAL from the third judicial district, Ada county.

Curtis & George, for the appellants.

A. Heed, district attorney, for the People.

MCBRIDE, C. J., delivered the opinion of the court, **SMITH, J.**, concurring.

The defendants, B. M. Du Rell & Co., are merchants in business, in the territory of Idaho, and as such are required by law to have a license before transacting business. For an alleged failure to comply with the statute, requiring them to have a license, they were prosecuted under a warrant issued by the probate judge of the county of Ada and territory of Idaho. Upon a trial had before the probate judge, the defendants were found guilty of the charge of selling goods without license, and sentenced to pay a fine of fifty dollars and costs. From this judgment and sentence, the defendants appealed to the district court, and upon a trial of the case therein, the defendants were again found guilty, and the judgement and sentence of the court below were affirmed. From the proceedings in the district court, the defendants appeal to this court, and for ground of reversal of the judgment below, allege:

1. That the probate court had no jurisdiction to try and

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punish offenses in this territory, and that its action in taking jurisdiction in this cause was without authority, and therefore erroneous.

2. That as the probate court had no jurisdiction of the case, the district court could not acquire jurisdiction by an appeal therefrom, and that consequently a judgment rendered in affirmance of the action of the probate court is erroneous.

3. That this is a criminal proceeding, and the offense charged is against B. M. Du Rell & Co., whereas it should be against some individual, to be maintainable.

On the other hand, the respondents contend that whether the probate court can have and exercise the jurisdiction to try and punish this class of offenses or not, this court can only review the errors of the district court; that the district court had an unquestioned jurisdiction of this class of cases; that defendants themselves appealed to that court and took no exceptions to its acquiring jurisdiction in the manner of an appeal, and can not now object that the mode by which it obtained cognizance of the case was irregular, and that as no exception to the jurisdiction was taken in the court below, the defendants can not urge in this court an exception which they waived in the inferior court.

The case involves questions of considerable importance, and we have given it as thorough examination as our time and facilities would allow.

As to what errors of the court below we will review we have to say, that while the position of the counsel for the people, that no objection can be brought forward to the jurisdiction in this court, after the party has submitted to the jurisdiction without exception in the court below, is very plausible, yet we think the question is fully settled by the statute. The party appealing brings his whole case before the appellate tribunal, and the whole record is there for review and he may challenge any part of it as erroneous. Section 471, Statutes of Idaho, p. 297, is as follows: "Upon the appeal any decision of the court in an intermediate order or proceeding, forming a part of the record, may be reviewed."

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We are clearly of opinion that if the record in this case is found to contain error in law, it would be the duty of this court to notice it, though the appellants may not have assigned the same. We proceed, therefore, to the review of that record.

The first question is, whether the district court had any rightful jurisdiction of the case.

There is no doubt that the district court has power to try and punish offenses of the class which is prosecuted in this case, and it can acquire jurisdiction of such cases in two ways, one by the regular intervention of a grand jury and the indictment of the offender, and the other by an appeal from the justice of the peace, who is specially authorized to proceed on complaint and arrest of defendant, to try and punish him. (See Statutes of Idaho, sec. 150, concerning crimes and punishments, p. 474.)

Both the district and justices' courts have original jurisdiction of the offense charged in this case, and the district court has, in addition, an appellate jurisdiction from justices' courts, and these two are the only courts of this territory that are by law invested with any power to try and punish offenses against the laws.

On a review of the record in this case we find that it was a proceeding having its origin in the probate court of Ada county; that all the original proceedings were in such court, and that the case came through that court into the district court, whence it was appealed to this forum. We think the district court erred in entertaining the appeal. In a criminal case, a party does not waive his rights by not insisting upon them, and if the court had no jurisdiction by law to try the case, it is not cured by the party failing to claim his right to be dismissed.

The case stands in the same condition as if it had been originally begun and tried before a private individual. The laws of the territory invest no man or court with authority over these offenses except justices of the peace and the district court, and the probate court was acting in neither capacity. It is true that he may act as a magistrate, but that

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is only for the commitment of offenders and not for their punishment, and in such case his is not a probate court, but is a magistrate's court, and should be so designated. As such he is also by law invested with the powers of a justice of the peace. If the validity of this law can be supported at all, it is not on the principle that he can be invested with a justice's jurisdiction as a probate judge, but that the legislature of the territory may provide for a justice of the peace, and constitute the person selected to fill the office of judge of probate as such an officer; and while he is in discharge of the duties appertaining to such, he is not acting as probate judge of the county for which he was chosen, but he is a justice of the peace, acting in the same character and performing the same duties as any other justice of the peace.

To support any judgment rendered by him as a justice of the peace, the record should show that he was acting in that character, and not as a probate judge, as in this case. It might as well be insisted that he could, in his capacity as a justice of the peace, grant letters of administration and appoint and remove guardians because the fact might be that he had authority to do these acts as probate judge, as that he could transact business which is exclusively that of a justice in a probate court.

It is not contended by the counsel for the plaintiffs that the defendant could have been punished by the probate court as such, or that such court has any jurisdiction to try criminal actions, and as we have decided that the whole record in the case is before us, that the court from which the original process issued had no jurisdiction, and that the district court could only obtain cognizance and jurisdiction in two modes, and that this case came into the district court by neither of those modes, it follows that, in our opinion, the action therein was erroneous and must be reversed.

There are some other questions upon the record which have been argued by counsel, but as a decision of them is not necessary to dispose of this case, we decline passing upon them at this time.

Opinion of the Court—Kelly, J.

Judgment and sentence of the court below reversed.

This case will be remanded to the district court, with an order to dismiss the case, taxing the costs incurred in the appeal against the appellee.

KELLY, J., having acted as counsel in the court below, did not sit on the hearing of this case.

M. L. HENRY, RESPONDENT, v. DAVID JONES ET AL.,
APPELLANTS.

INSTRUCTIONS.—It is not error to refuse an instruction which is foreign to the pleadings and evidence, although correct in principle.

Shaffer & Ainslie, for the appellants.

Rosborough & Preston, for the respondent.

KELLY, J., delivered the opinion of the court, McBRIDE, C. J., and SMITH, J. concurring.

This action was instituted by one co-tenant against the other co-tenants, to recover his portion of the value of the water flowing in a ditch leading from Lewis' Gulch, in Boise county, and owned jointly by plaintiff and defendants.

The only point relied on to reverse the judgment is because the court below refused to instruct the jury "that if they believed from the evidence that plaintiff told defendants to take the water and use it for their pay, and in pursuance thereof defendants did take it and use it, they should find for defendants." The defendants do not set up any such contract in their answer, but expressly deny that they ever entered into any contract, or are in any manner indebted to plaintiff for his portion of said water.

The instruction was entirely foreign to the pleadings, and was not warranted by the evidence. It was therefore properly refused.

Judgment below is affirmed.

Opinion of the Court—Kelly, J.

THE PEOPLE, PLAINTIFFS, v. JOHN FARRELL, DEFENDANT.

CERTIFYING CAUSES INTO THE SUPREME COURT.—The provisions of section 326 of the civil practice act, authorizing the district court to certify questions of law to the supreme court for decision, apply to civil cases only.

THE defendant was indicted in the district court of the third judicial district, in and for Ada county, for the crime of murder. At the April term of said court, 1866, he moved, upon affidavits, for a change of venue, which motion was denied. Afterwards, the defendant having procured additional affidavits, moved the court to reopen and re-examine the motion for a change of venue, which motion was also refused. The defendant then filed his additional affidavits, whereupon the court made the order referred to in the opinion of the court.

Albert Heed, district attorney, for the people.

Curtis & George, and I. N. Smith, for the defendant.

KELLY, J., delivered the opinion of the court, MCBRIDE, C. J., concurring.

This cause came up to be heard in the court below upon the motion of defendant for a change of venue, and after the argument of counsel the court made the following order: "After hearing of said motion the court withheld further judgment thereon, and the same was adjourned into the supreme court for a hearing and decision of said motion."

The three hundred and twenty-sixth section of the civil practice act provides as follows: "Whenever on the trial of an action at law, in the district court, it shall be found to turn on an important or doubtful principle of law, the court may direct a special verdict to be found; and in all cases the parties may agree upon the facts, and such agreement, in writing, signed by the parties or their attorneys, shall be made a part of the record; and all questions of law arising on special verdicts, agreed cases, motions for new trial, and all others in any manner arising in the district courts,

Statement of Facts.

in law or equity, may be adjourned into the supreme court for decision; and the supreme court may give judgment, or remand the cause, or make any order according to the law of the case."

This is a statutory provision for the submission or the adjournment of doubtful questions which may arise in a district court on the trial of an action at law or equity to the supreme court. Such cases are confined to the civil practice. Appeals to the supreme court in criminal cases must be taken from a final judgment of the district court, or from an order of the district court, allowing a demurrer, granting or refusing a new trial. (See criminal practice act, sec. 463.) The motion adjourned into this court arises upon a question which the district judge should first decide in that court. To take any other view of the case would tend to allow defendants in criminal cases, whenever in the progress of a trial they see proper to take exceptions, to ask to have the question adjourned to the supreme court for its decision. The statute does not contemplate such a course.

The question must therefore be remanded to the district court for final adjudication.

HILL BEACHY v. B. F. LAMKIN.

OFFICER.—Proceedings against an officer for neglect of duty, being a personal default, will by no means involve his successor.

COSTS.—In no event could this court render judgment against the territory for costs, there being no mode of enforcing it, or process by which it could be made effective.

FROM the first judicial district, Nez-Perce county.

Suit instituted April 12, 1864, to compel defendant, as territorial auditor, to audit an account against the territory, and to number the same four and a half ($4\frac{1}{2}$), in order to get payment in advance of other accounts already audited and numbered. After some interlocutory motions and proceedings, the following order was made by the presiding judge, on May 2, 1864:

Opinion of the Court—McBride, C. J.

On hearing the above cause, it is ordered that a mandamus issue to the said B. F. Lamkin to audit the claim of said Beachy and number it four and one half (4½). And the said cause is hereby remanded to the supreme court, and the clerk will send all the papers in this case to the clerk of the supreme court. And the auditor, the said B. F. Lamkin, is hereby authorized to audit the claim of E. F. Gray, and the costs of this suit against the territory. This is, however, in no way to conflict with any payment heretofore made by the treasurer, but to take precedence of all the claims allowed and not paid prior to the issue of the alternative mandamus.

ALECK C. SMITH,

Judge First Judicial District.

Upon this order the transcript comes into this court. Whereupon the following stipulation was entered into by the parties subscribing the same:

June 2, 1866. Now on this day comes H. B. Lane, controller of Idaho territory, and successor to B. F. Lamkin, former auditor of said territory, and the said H. B. Lane representing the said officer, and Hill Beachy by A. Heed, his attorney, and hereby stipulate and agree that the appeal heretofore taken in the above-entitled action be dismissed, at the costs of the said territory of Idaho.

H. B. LANE,

Territorial Controller.

HILL BEACHY,

Per A. HEED, Attorney.

McBRIDE, C. J., delivered the opinion of the court, KELLY, J., and SMITH, J., concurring.

This action was brought to compel the defendant by mandamus to perform an official act which plaintiff alleges he had failed and neglected to do. The case was determined by the district court of the first judicial district, in favor of the plaintiff, and the judge thereafter, upon his own motion, ordered his clerk to transmit the papers and record to this court.

The plaintiff Beachy, and one H. B. Lane, who claims to

Points decided.

be the successor in office of the defendant, now move by a stipulation on file to dismiss the case from the calendar and for judgment against the people of the territory for costs.

This motion must be denied. The case is not in this court at the instance of the parties, and while the court would, on an intimation that the merits of the case were no longer in issue, probably dismiss it, the parties have not, as in other cases brought here on their own motion, the right to have it dismissed. But the objection to the motion is conclusive in another point of issue.

Mr. Lane, even if he were the successor in office of Mr. Lamkin, would not be a proper party to this record. The proceeding was against Lamkin for neglect of duty, and, being a personal default, would by no means involve his successor. Lamkin was proceeded against for a personal failure to perform a duty charged as required by law. Mr. Lane, who has been guilty of no such neglect of duty, could not be made responsible for the faults, however grievous, of his predecessor. In no event could this court render a judgment against the territory for costs. We have no means of enforcing it, there being no process by which it could be made effective.

If the territory is liable for costs, the account must be presented in the usual way and the liability discharged as all others are. An execution could not issue, and the judgment would be entirely nugatory and void.

Motion denied.

THE PEOPLE v. GILLESPIE.

COUNTY COMMISSIONERS—RESIGNATION—FILLING VACANCY IN OFFICE—COMMISSIONERS.—Under the statutes, the resignation of a county commissioner must be tendered to the board of which he is a member, and the vacancy must be filled by the commissioners. The governor has no power to fill such vacancies.

APPEAL from the third judicial district, Ada county.

Albert Heed, district attorney, for the appellants.

Curtis & George, for the respondent.

Opinion of the Court—Smith, J.

SMITH, J., delivered the opinion of the court, McBRIDE, C. J., concurring.

The people were complainants against R. L. Gillespie in an action of *quo warranto* for usurping the office of county commissioner, and for wrongfully exercising the duties of that office. It appears from the record that one Gilbert resigned the office of commissioner of said county, to the governor of the territory, who appointed and commissioned one R. H. Lindsay to fill the vacancy occasioned by such resignation. It also shows that Robert L. Gillespie was appointed to fill the same vacancy by the other members, constituting a quorum of the board of commissioners of said county. Gillespie qualified and entered upon the office under his appointment, the said Lindsay claiming to be entitled thereto under his appointment by the governor.

The only question for this court to determine now is, who had the right to appoint or fill said vacancy? Section 9, parts 2 and 3 of the act creating officers, page 593, sets forth fully and completely to whom and the manner in which all resignations shall be made; and it appears that it was the duty of the said commissioner to have resigned to the county commissioners, and, further, that by virtue of the resignation being made to them they had the appointing power.

The decision of the court below is affirmed and the cause remanded for further proceedings.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT,
AUGUST ADJOURNED TERM, 1866.

PRESENT:
HON. JOHN R. McBRIDE, CHIEF JUSTICE.
HON. MILTON KELLY, } JUSTICES.
HON. JOHN CUMMINS, }

T. J. MOORE *v.* HENRY KOUBLY.

CLERK'S CERTIFICATE.—The certificate of the clerk of the district court that the “judgment has been duly appealed” will not cure any defects in the record. It is for the court to determine that question from the record.

APPEARANCE—WAIVER.—A party appearing generally, in a suit or proceeding, thereby cures whatever defects may exist in the original process to bring him into court.

IDEM.—A voluntary appearance in an action is as effectual for any purpose as due service of process.

IDEM—NOTICE OF APPEAL.—A party appearing generally in a case on appeal in this court, thereby waives all informalities in the notice of such appeal, or want of service of the same.

JURISDICTION—PROBATE COURTS.—The act of the legislature conferring appellate jurisdiction upon the probate courts in civil cases, is in conflict with the organic act.

APPEAL from the first district, Nez Perce county.

A. Heed, for the appellant.

Appellant seeks to have the court review all intermediate orders and judgments, and to have the order and judgment

Opinion of the Court—Cummins, J.

of the district court reversed, and to have the judgment of the justice of the peace affirmed with costs. (Stats., p. 141, secs. 292 and 293.)

Curtis & George, for the respondent.

There is no evidence of the service upon respondent of any notice whatever of this appeal. The record shows no judgment or order of the court below in the case. The appeal from the probate court to the district court was without authority of law, and conferred no jurisdiction upon that court in the case, either original or appellate. And the district court very properly decided nothing. The most that court could have done was to have dismissed the appeal.

This court can not go behind the district court to review any order or judgment made by any inferior court. This court can only act upon the proceedings, judgment, or orders of the district court from which the appeal was brought here, whether the same be intermediate or not. Nor can this court affirm the judgment of the justice of the peace, as no appeal lies from that court to this. And no remittitur or mandate could be sent there. If the inferior court erred, the district court was open to correct them; and this court to correct the errors of the district court. In this case the district court committed no error by having done nothing.

All the proceedings in all the courts below have been and are *coram non judice* and void, and this appeal is the same. The justice had no jurisdiction over the subject-matter; the probate court, under the organic act, had no appellate civil jurisdiction; the district court had no jurisdiction on appeal from a justice's court through a probate court; this court has no jurisdiction whatever to determine any of the rights of the parties, because no such rights were submitted for the determination of the district court, and it determined none—not even awarding costs.

CUMMINS, J., delivered the opinion of the court, McBRIDE, C. J., and KELLY, J., concurring.

This was an action in replevin, originally commenced and tried in the justice's court for the recovery of specific per-

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sonal property, or its value, which was determined in favor of the plaintiff. From that court the defendant appealed to the probate court of Nez Perce county. When the cause was called up for hearing in the probate court, on the fifth of February, 1864, plaintiff, by his counsel, moved the court to dismiss the cause, upon the ground that the probate court did not possess, nor could it exercise, appellate jurisdiction. This motion was allowed by the court, and the cause accordingly dismissed. From this judgment, or order of dismissal, the defendant appealed to the district court of the first judicial district. On the first day of April, 1864, the cause being called up for hearing in the district court, that court reversed the judgment of the probate court in sustaining the motion, holding that the probate court was properly invested with and could exercise appellate jurisdiction, and hence erred in dismissing the cause. But whether the case was remanded to the probate court, as would have been proper under this ruling, for further or for any proceedings, does not clearly appear from the record before us.

From the judgment of the district court disallowing the motion filed in the probate court, and declaring that that court could legally exercise appellate jurisdiction, the plaintiff appeals to this court. Upon this state of facts, the respondent files a motion to dismiss the appeal upon the grounds: .

1. That there is no evidence in the record or transcript from the court below of service of the notice of appeal on the respondent.

2. There is no judgment of the court below (meaning the justice's court) from which an appeal will lie.

As to the first point raised by this motion, it is true the record does not show or contain those facts necessary to constitute legal service of a notice. A certified copy of the notice of appeal is set out in the transcript, together with a certificate of the clerk that the appeal was "duly taken to the supreme court by the filing and service of the proper notice," etc. The rule is well understood that it is for the court and not for the clerk to determine whether an appeal has been properly taken. It is the duty only of the clerk to

Opinion of the Court—Cummins, J.

of the district court reversed, and to have the judgment of the justice of the peace affirmed with costs. (Stats., p. 141, secs. 292 and 293.)

Curtis & George, for the respondent.

There is no evidence of the service upon respondent of any notice whatever of this appeal. The record shows no judgment or order of the court below in the case. The appeal from the probate court to the district court was without authority of law, and conferred no jurisdiction upon that court in the case, either original or appellate. And the district court very properly decided nothing. . The most that court could have done was to have dismissed the appeal.

This court can not go behind the district court to review any order or judgment made by any inferior court. This court can only act upon the proceedings, judgment, or orders of the district court from which the appeal was brought here, whether the same be intermediate or not. Nor can this court affirm the judgment of the justice of the peace, as no appeal lies from that court to this. And no remittitur or mandate could be sent there. If the inferior court erred, the district court was open to correct them; and this court to correct the errors of the district court. In this case the district court committed no error by having done nothing.

All the proceedings in all the courts below have been and are *coram non judice* and void, and this appeal is the same. The justice had no jurisdiction over the subject-matter; the probate court, under the organic act, had no appellate civil jurisdiction; the district court had no jurisdiction on appeal from a justice's court through a probate court; this court has no jurisdiction whatever to determine any of the rights of the parties, because no such rights were submitted for the determination of the district court, and it determined none—not even awarding costs.

CUMMINS, J., delivered the opinion of the court, McBRIDE, C. J., and KELLY, J., concurring.

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sonal property, or its value, which was determined in favor of the plaintiff. From that court the defendant appealed to the probate court of Nez Perce county. When the cause was called up for hearing in the probate court, on the fifth of February, 1864, plaintiff, by his counsel, moved the court to dismiss the cause, upon the ground that the probate court did not possess, nor could it exercise, appellate jurisdiction. This motion was allowed by the court, and the cause accordingly dismissed. From this judgment, or order of dismissal, the defendant appealed to the district court of the first judicial district. On the first day of April, 1864, the cause being called up for hearing in the district court, that court reversed the judgment of the probate court in sustaining the motion, holding that the probate court was properly invested with and could exercise appellate jurisdiction, and hence erred in dismissing the cause. But whether the case was remanded to the probate court, as would have been proper under this ruling, for further or for any proceedings, does not clearly appear from the record before us.

From the judgment of the district court disallowing the motion filed in the probate court, and declaring that that court could legally exercise appellate jurisdiction, the plaintiff appeals to this court. Upon this state of facts, the respondent files a motion to dismiss the appeal upon the grounds: .

1. That there is no evidence in the record or transcript from the court below of service of the notice of appeal on the respondent.

2. There is no judgment of the court below (meaning the justice's court) from which an appeal will lie.

As to the first point raised by this motion, it is true the record does not show or contain those facts necessary to constitute legal service of a notice. A certified copy of the notice of appeal is set out in the transcript, together with a certificate of the clerk that the appeal was "duly taken to the supreme court by the filing and service of the proper notice," etc. The rule is well understood that it is for the court and not for the clerk to determine whether an appeal has been properly taken. It is the duty only of the clerk to

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certify to the facts as they exist, in relation to the notice and its service; and it is the province of the court to determine whether these facts constituted legal service—such service as will give this court jurisdiction of the respondent. If they do not, the certificate of the clerk that a “judgment has been duly appealed,” will not obviate the defect in the record.

Though it does not affirmatively appear on the papers in this court that due service of the notice of appeal was had upon the respondent, yet we do not deem the objection here well taken. The object to be attained by a notice of appeal and service of the same, is to notify the respondent that an appeal has been taken, and of the court in which he is to appear to oppose the reversal or modification of the judgment or order by which the appellant alleges he has been aggrieved.

It is a well-established rule of law, upon principle as well as authority, that if a party appear in a suit or proceeding, he thereby cures or waives whatever defects may exist in the original process itself necessary to bring a party into court, or whatever irregularity may have occurred in the service of such process. A voluntary appearance in a suit is as effectual for any purpose as due service of process. The supreme court of the United States, in the case of *The United States v. Curry et al.*, say that “the appearance of the defendant in error, by attorney, in the appellate court, superseded the necessity of a citation; and after such appearance no advantage can be taken of the want of a citation, even though the attorney, for special reasons, should be allowed to withdraw his name.” (See *United States v. Curry et al.*, 6 How. 106.) It is proper here to remark that the citation there referred to is nothing more than a formal notice to the defendant in error, and answers to our notice of appeal. In the case before us, the respondent, by his attorney, has appeared and filed a motion, as before stated, not only raising the question of the legal sufficiency of the service of the notice of appeal, so far as the facts contained in the record are concerned, but also raising the question of the legal sufficiency of the judgment in the

justice's court, as shown by the transcript, to sustain an appeal for any purpose. From this it can not be seriously contended that the respondent has not appeared generally to the case. This being true, the object and purpose of the notice of appeal has been as fully and effectually accomplished as if the service of the same had been made upon the respondent.

A respondent ought not to be permitted to come into an appellate court and raise objections going to the substantial merits of the case, on a motion to dismiss the appeal, and at the same time contend that he is not in court; that the court has not jurisdiction of the matter in controversy, by reason of a want of due service of the process or notice necessary to bring the respondent there. A party, therefore, appearing generally in a case on appeal in this court, thereby waives all informalities in the notice of such appeal, or want of service of the same.

It will be unnecessary to pass upon the second objection raised by respondent's motion, as it will be proper first to examine into and pass upon the question of the appellate jurisdiction of the probate court involved in the record, which the court below determined in the affirmative on a motion from that court. The determination of this question will dispose of the case in this court.

This cause was instituted in the justice's court on the seventh day of November, 1863, and by agreement of parties entered of record and heard on the same day. The defendant filed his notice of appeal on the same day, and procured service of the same upon the plaintiff on the ninth, as appears from the sheriff's return on the same. The appeal, as the record shows, was taken to the probate court before the convening of the first session of the legislative assembly—hence, prior to the enactment of a code of procedure, civil or criminal, for the territory. It is, therefore, presumed that the parties were governed by the statutes of Washington territory, in force in Nez Perce and other counties segregated from that territory by the act of congress of March 3, 1863. From an examination of these statutes, it will be found that they did authorize an appeal to the pro-

Opinion of the Court—Cummins, J.

bate court from the justice of the peace. The question then arises, Was it competent for the legislature to invest these courts with appellate jurisdiction? The ninth section of the act of congress of March 2, 1853, conferring judicial power upon the territory of Washington, contains precisely the same language found in the corresponding section of the act of March 3, 1863, conferring judicial power upon this territory. It is there declared that the "judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace." And, further, that "the jurisdiction herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be as limited by law." Sufficient is here quoted from that act to indicate generally the distribution of the judicial power among the several courts created thereby, and the character and extent of the jurisdiction with which those inferior courts are invested, as well as the authority under which the legislature attempted to clothe the probate courts with appellate jurisdiction. In other words, a complete judiciary system was by that act established, with the general nature and extent of the jurisdiction conferred upon each branch thereof, either declared by the express terms of the act itself or by the terms by which those courts are designated. To illustrate our meaning more fully: Justices of the peace are public officers, well known to our jurisprudence, invested with judicial powers for the purposes of preventing breaches of the peace, and bringing to punishment those who have violated the law, and in many of the states and territories are possessed of limited jurisdiction in civil matters. The district courts are tribunals of general jurisdiction, both common law and chancery, and the supreme court possesses almost exclusively appellate power. These terms import too clearly the nature and powers of these courts to afford ground for any doubt as to their jurisdiction. And yet the only express limitation of the jurisdiction of the court of justice of the peace contained in the organic act, unless it be found in the name of the court itself, is as to civil business, where "the title

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or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars.”

The probate courts established by that act are also tribunals of limited jurisdiction. They exist in some form or other in every state and territory composing our government, and the general nature and powers of the same are as well understood and as clearly defined as are those of other courts above enumerated. The very names or terms by which these courts are designated have a clearly defined and well-known signification or meaning in our jurisprudence. The mere mention of the title of the court conveys to our minds clear preceptions of its power and jurisdiction. The probate courts, it is well understood, *ex vi termini*, have been established for the proof of wills, for the general management and final settlement of decedents' estates, for the general supervision of guardians and their wards, and all other matters legitimately pertaining to this class of business. The nature and scope of authority, here indicated as possessed by the probate court, are as well understood by the term designating that court as are either of the other courts known to our judiciary system. And yet no one would contend for a moment that because the legislature are not inhibited by express terms, therefore they may confer, for instance, chancery powers upon justices' courts. Still the only plausible argument which is or can be urged to sustain the proposition that the legislature may confer upon or invest the probate courts with civil or appellate jurisdiction, is founded upon the absence of any express prohibition, in the organic act establishing these courts, against the granting of such power.

The conclusion from the foregoing is, then, but reasonable and proper, that when congress used the terms by which they designated the several courts they established in these territories, and in distributing the power among them, they intended to and did use those terms by which these courts are denominated with reference to their well-known and uniformly accepted definition, and that they intended to confer upon and invest these courts respectively with such jurisdiction and power only as legitimately and

Points decided.

properly belongs to them, and as indicated by their several titles. If, then, congress, when they used the term "probate court," intended thereby to establish a court for the proof of wills, etc., and certainly this is the only reasonable and legitimate inference to be drawn from the language of the act itself, then the words "as limited by law" occurring in the organic act, were evidently intended to restrict those courts of inferior jurisdiction to the exercise of that power or authority only which their titles import. Hence, the act of the legislature, giving appellate jurisdiction to these probate courts, was in contravention of the provisions of the act of congress, from which all legislative as well as judicial power is derived; and, therefore, the judgment of the court below, reversing the judgment or order of the probate court dismissing the appeal for want of jurisdiction, was erroneous.

The judgment of the district court is reversed, and the cause is remanded, with instructions that the appeal in that court be dismissed.

THE PEOPLE v. ALFRED SLOCUM ET AL.

CONTRACT—PARTY PLAINTIFF.—When a contract is made with a party in which another has a beneficial and resulting interest, the party with whom the contract was made has the right to recover though he allege the injury only to be to the stranger to the instrument or contract.

OFFICIAL BOND.—A bond not filling the statutory requisites, yet which is lawful in itself and intended to protect the public, is a good bond.

IDEM.—If the bond which the law required of the defendants was not given, if the one given, instead of containing all the conditions which it should have contained, was less onerous, this is no defense to the breach of those conditions to which the defendants were parties.

STATUTORY BOND—OFFICER.—If a person get possession of an office by usurpation only, and give a statutory or a legal bond, and a breach of its conditions be committed, he is as much liable on such bond as though he had been duly elected or appointed.

SURETIES.—The sum set opposite the names of the respective parties subscribing a bond joint and several by its terms, is intended to show the sums for which they intend to justify and to fix their liabilities towards each in the event of the collection of the penalty.

CAUSES OF ACTION—PLEADING—JOINDER.—The rule under the code allows a party to state as many causes of action as he may have, if they are of a character to be properly combined in the same complaint, but it does not permit a party to set out the same causes under different forms.

Statement of Facts.

VARIANCE—PROOFS.—It is considered no variance from the proof if the facts show a substantial right to recover under the allegations, and the necessity of having various forms of stating the same cause of action is thus fully obviated.

APPEAL from the second judicial district, Boise county.

The title of the suit as set out in the complaint is:

The people of the United States in the territory of Idaho, upon the relation of C. B. Waite, district attorney of said judicial district, suing for the use of said county of Boise, against Alfred Slocum (and twenty-four others, sureties).

The following is a copy of the bond sued upon:

“Know all men by these presents: That we, Alfred Slocum, as principal, and A. Scheline, E. Helfer, I. Sterne, I. C. Adams, I. H. Bowman, J. H. Heckman, H. H. Raymond, D. Markham, W. W. Chipman, M. McCormick, J. Sanders, D. Wertheimer, F. B. Butler, J. M. Betts, S. Owens, P. Kelly, J. Clarressy, F. C. Brown, E. Peyton, C. L. Goodrich, Sam'l Lawrin, Geo. Meritt, P. B. Smith, Frank Campbell, as sureties, all of the county of Boise and territory of Idaho, are held and firmly bound unto the people of the United States in the territory of Idaho, the said Alfred Slocum as principal, in the sum of thirty thousand dollars; the said E. Helfer as surety, one thousand dollars; the said I. Sterne as surety, one thousand dollars; the said I. C. Adams as surety, one thousand dollars (thus on through the list of sureties, ranging from one to five thousand dollars); for payment of which well and truly to be made we bind ourselves and our and each of our heirs and legal representatives in the respective amounts for which we become bounden as above, jointly and severally firmly by these presents.

“The condition of the above obligation is such, as, whereas the above-bound Alfred Slocum was, at a general election held in said county and territory on the tenth day of October, 1864, elected treasurer of said county by reason whereof and by operation of law he became treasurer of said Boise county: Now if the said Alfred Slocum shall truly and faithfully discharge the duties of said office of treas-

Argument for Defendants.

urer of said county according to law, then this obligation shall be null and void, otherwise to be and remain in full force and effect." (Then follow the signatures of the parties subscribing the bond, with the sums set opposite their names respectively, as above indicated.)

To the bond there is appended the justification of the sureties.

Defendants demur to the complaint; a formal ruling on this demurrer was made by the district court, and the cause adjourned into the supreme court for hearing on such demurrer.

C. B. Waite, for the plaintiffs.

J. K. Shaffer and S. A. Merritt, for the defendants.

The statute provides that each county treasurer, before entering upon the duties of his office, shall enter into bond with two or more sufficient freehold sureties, in double the probable amount, etc. (Stats., p. 499, sec. 108.) That which should be done the law presumes to have been done. It appears from the complaint that Slocum was acting as treasurer of Boise county, and as such received — dollars from C. D. Vajen, before the execution of the bond sued on in the complaint. If then the law presumes him to have entered into bond before entering upon the discharge of the duties of his office, the complaint is fatally defective, in not alleging facts that discharge said bond, as cancellation, exhaustion, discharge, etc. The board of commissioners is a tribunal of inferior and limited jurisdiction, and can exercise no powers except such as are conferred by statute. The board is the creature of the statute. The statute does not authorize the board to require or take an additional or further bond after having entered upon the discharge of the duties of his office. Nor can the board do so. It would be the act of the members of the board as citizens, and not in their capacity as a board. A bond exacted by an officer when he has no authority to require it is void. (*Benedict v. Bray*, 2 Cal. 255; *Thompson v. Lockwood*, 15 Johns. 256.) There is no averment in the com-

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plaint that the board of commissioners fixed the sum of thirty thousand dollars or any other sum as the amount of the bond of the treasurer.

The bond itself is a legal curiosity; it is neither a common law bond, nor is it a statutory undertaking; it is joint: as many obligations of the principal and each of the sureties as there are sureties. (*People v. Hartley*, 21 Cal. 589.) The statute requires a joint bond, or a joint and several bond; each obligor must undertake to pay the whole penalty. A voluntary bond to the state, without legislative authority to secure performance, etc., is void. (*Commonwealth of Kentucky v. Bassford*, 2 E. D. Smith, 218; 1 Abb. Dig. 484.) When a statute prescribes the condition of a bond, its provisions must be strictly complied with, or the bond will be void. (Abb. Dig., p. 484, sec. 12; 21 Wend. 88.) Sureties are not liable for past defaults unless made so in terms. (*Farrar v. United States*, 5 Pet. 373; Curtis Dig., p. 66, sec. 1.)

When an act requires a bond to be taken with a condition for the faithful disbursement of public money, and also for the faithful discharge of duty, and the former is omitted from the condition, query, whether the latter can be shown by proof to cover it. (*Farrar v. United States*, 5 Pet. 373; Curtis Dig., p. 67, sec. 7.) No person who is not the obligee of the bond or its assignee, can put it in suit unless authorized to do so by the legislature. It is not enough that a breach of the bond has damnified the person who brings the suit. (*Corporation of Wash. v. Young*, 10 W.; Curtis Dig., p. 65, sec. 8.)

MCBRIDE, C. J., delivered the opinion of the court, KELLY, J., concurring.

The complaint in this case alleges that Alfred Slocum was the treasurer of Boise county; that on the twenty-sixth day of June, A. D. 1865, he and the other defendants executed their bond, a copy of which is set out in the complaint, to the people of the territory of Idaho, in the penal sum of thirty thousand dollars, for the faithful performance of the said Slocum's duties as such officer; that on the thirtieth

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day of the same month and year, said bond was approved, filed and recorded in the office of J. M. Murphy, county recorder of Boise county. The complaint further avers that said Slocum was acting in the capacity of county treasurer from the said twenty-sixth day of June, 1865, until the eleventh day of January, 1866, and sets out four several breaches of the conditions of said bond.

The first breach assigned is that during the time the defendant, Slocum, was acting as county treasurer, he received funds amounting to about the sum of three thousand dollars, belonging to the county of Boise, which sum he neglected and refused to pay over according to law.

The second breach assigned is, that during the time the defendant, Slocum, was so acting as county treasurer, he received about the sum of three thousand dollars—proceeds of the tax levied and collected on real estate, personal property, moneys collected as poll taxes, and licenses in and for said county—and that said defendant failed and neglected to pay warrants properly drawn on said funds according to law.

The third breach assigned is that during the time the defendant, Slocum, was acting as county treasurer, he had in his possession about the sum of four thousand dollars belonging to the said county of Boise, which had been paid to him by his predecessor in office; and, further, the sum of one thousand dollars which had been paid to him in his capacity as county treasurer, which funds the defendant did not disburse as required by law, and has wholly failed and neglected to account for in any way whatever.

The fourth breach assigned is that the defendant Slocum was on the fifteenth day of January, 1866, the county treasurer of Boise county, and had as such officer received the sum of about three thousand dollars, and had the same on hand or should have had; that said Slocum, on going out of said office of county treasurer on the fifteenth day of January, 1866, did not, as required by law, deliver to his successor in office said sum or any part thereof.

The plaintiff, after assigning the breaches, prays judgment for the penalty of the bond sued upon and their costs.

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To this complaint a portion of the defendants appear by their attorneys and demur, and for grounds say: 1. That the plaintiffs have not the legal capacity to sue; 2. That the complaint does not state facts sufficient to constitute a cause of action; 3. That the complaint is ambiguous, unintelligible, and uncertain.

On the hearing in the district court a formal ruling was made by the presiding judge, and the case adjourned under the statute into this court for decision.

The first question presented by the demurrer is that the plaintiffs have not legal capacity to sue. We suppose that the defendants did not intend to insist that the people of the territory of Idaho had no right to be plaintiffs in any action whatever, and yet the language of the demurrer is only general and does not apply to this case any more than to any other. Construing this pleading according to the rule, it is only a general impeachment of plaintiffs' capacity to sue, and if it should appear that a suit might be brought and maintained by the plaintiffs in any case, then this point should be overruled, for the demurrer does not deny their capacity in this case, but simply their general capacity to be plaintiffs in a suit. But as we do not desire to treat this question hypercritically, and as it is desirable for many reasons to dispose of it on its merits, we propose to pass on the direct question of the legal capacity of the plaintiffs to maintain this action.

To determine the point correctly, we go to the code. The statute provides "that every action shall be brought in the name of the real party in interest." This was intended to simplify the proceedings in the courts, and prevent circuitry of action. It is a provision eminently just and wise, and easy of application. To determine who are proper parties in this case, we must look to the instrument upon which this action is brought. It is a bond made and executed by the defendants, Slocum and others, to "the people of the United States in the territory of Idaho," and is an engagement for the performance of certain duties imposed by law upon one of the obligors.

Being an official bond, and not assignable, no one can

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put it in suit, except the express obligee of the bond itself. The county of Boise can not sue upon the bond, because it is in no way a party to its execution, and we think that the fact that the district attorney has alleged that this action is brought for the use of Boise county has misled the defendants into the error of thinking that the action is brought by the county of Boise.

It is true that is alleged to be for the use of Boise county, and it appears that Boise county is the injured party and entitled to the indemnity if recovered. There are numerous decisions under the code going to sustain the doctrine that when a contract is made with one party in which another has a beneficial and resulting interest, the party with whom the contract was made has the right to recover, though he allege the injury to be only to a stranger to the instrument or contract. The following is a case in point:

B. executed ten subscription notes, whereby he promised to pay a certain sum to V. C., as "execution agent of an incorporated company;" held that V. C. was the "trustee of an express trust" within the meaning of that term as used in the code, and as such could maintain an action upon the notes in his own name. He was a person "in whose name a contract is made for the benefit of another." (*Considerant v. Burbaum*, 22 N. Y.; 8 Smith, 389.) It was insisted by the defendant in the argument that the breach of the voluntary bond to the state, given without legislative authority for the benefit of a third person, afforded no ground for a recovery. But that is not this case. A bond in this case is required by law—based upon an admitted consideration moving from the county of Boise to the obligee of the bond, and though not complying with the legislative requisites of such an instrument, is still sanctioned by legislative authority. Such an instrument can not be likened to one given without authority for a purpose unknown to the law, and for the benefit of a person who advanced no consideration as a basis of conditions.

But even admitting that this view is incorrect, still the averment that the action is brought for the use of Boise

county might be rejected as surplusage, as an unnecessary averment, and yet not defeat the plaintiffs' right to recover.

The law requires the district attorney to prosecute all actions on behalf of the people in the district, and to pay over all moneys which he may collect according to law; and when, in the name of the people of the territory, he recovers moneys which belong, or are to be applied, in any particular direction, he is bound, by his oath of office and his bond, to make the proper application, and in this case if, without averring that the action was for the benefit of Boise county, he should have brought suit and recovered the penalty of this bond upon evidence of the facts alleged in the complaint, the law would require him to apply the proceeds to indemnify Boise county, and for any neglect in so doing he would be responsible.

But we are of opinion that when the action is brought to indemnify a party beneficially interested in the instrument, and not a party to its execution, the allegation that it is for his use is legal and proper. It advises the defendant of the facts constituting the grounds of the action, and enables him to make his defense in the suits. It is good law and good pleading.

The second ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. On this point in the demurrer, the defendants, by their brief, raise the general question of the validity and legality of the bond declared upon, and upon the determination of these questions this action wholly depends.

We proceed, therefore, to consider the points presented. It is urged that this bond is not in compliance with the statute, was not executed in pursuance of any statute, and is therefore void.

The first part of the objection is just. The corollary we, however, deny. If the intention of the parties was to execute a bond, filling the statutory requisites, then they utterly failed in their attempt. The remaining question growing out of this objection, is, If the defendants executed a bond which was lawful in itself, intended to protect the public,

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and there have been breaches of its conditions, can it be enforced?

We are clearly of the opinion that good morals, public policy, and the law, sustain the affirmative of this proposition. If the bond which the law required of the defendants was not given, if the one given, instead of containing all the conditions which it should have contained, was less onerous, has he or have his sureties any right to complain? The failure to exact the statutory conditions is no defense to the breach of those to which they were parties, and that they are milder in form is due to the lenity of public officers, and is a circumstance which is no defense for these defendants. We acknowledge the doctrine contended for in the case of *Benedict v. Bray*, 2 Cal. 255. But the case bears little analogy to this. That was a bond exacted without any authority whatever, and when none was required by law. In this case the law required a bond of the county treasurer; it was his duty to execute one, and in doing so, if he gave one less stringent, less burdensome, and more liberal than the law, strictly and properly enforced, would have exacted, he can not claim exemption for admitted liabilities under it. It is not the case of an obligation under legal duress, as it were, but a bond given to comply with the law, and yet falling short of its provisions; and to allow a defendant to escape such an obligation would be to permit him to take advantage of his own wrong. And while we admit that this is not a statutory bond, it is a lawful bond, and may be enforced under the general law as being sustained by legislative authority.

Another objection raised by the brief is that the complaint does not sufficiently show that the defendant was county treasurer. We think the objection unsound. He is alleged to be the county treasurer of Boise county. If the controversy was whether he is such officer, then the additional facts showing his election and qualification might be necessary; but if he never was legally elected, and never lawfully qualified, and yet got possession of the office, by usurpation only, giving the bond which he has given, and committed a breach of its conditions, would defendants

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claim that he could escape by showing that he was not legally the county treasurer? He would be equally liable in the one case as the other.

If he assumed the capacity, gave bond as such, and received moneys belonging to such an office, his liability, though he was legally a trespasser upon the office, would be just the same as if no legal objection to his official capacity existed. The gist of the action is that he received moneys in a certain capacity, which the law implies shall impose a particular application as the result of his assumed position, and he can not take advantage of his own wrong, by showing that he was not the officer he professed to be, and if it could not be pleaded as a defense, the plaintiffs could not be asked to negative it in their complaint.

This reasoning disposes of these objections growing out of an alleged want of authority on the part of the board of county commissioners to require additional bonds, or any bond, at the time this is alleged to have been given—all this we conceive to be, for the purpose of this suit, irrelevant and immaterial.

The law does not permit an officer to shelter himself from responsibility for his own acts behind the neglect of another. Suppose the board of commissioners had never required any bond, never fixed any amount for a bond, had never accepted any bond; or suppose, in fine, the defendant had never given any bond whatever, he would still, if solvent and able to respond to a suit, be liable for any money received in his assumed official capacity. This is good morals, and we believe sound law.

The next question is, What are the parties to this bond obligated for, and in what sum? The instrument itself shows what it is given for. It is to guarantee the "faithful discharge of the duties of said office of treasurer of said county according to law," by the defendant Slocum. That is the condition, now what is the penalty? The whole penalty is unquestionably thirty thousand dollars. But it is contended by defendants, that having agreed to the bond and signed as sureties in less sums, and for various amounts, they are bound only for those amounts. There is much

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apparent reason for this assumption, yet this results more from the phraseology than the substance of the bond, and to give it such a construction would be to destroy the instrument.

What sort of a judgment could be rendered on an instrument so interpreted? It is expressed to be a joint as well as a several bond, and yet if this construction be given to it, it would be impossible to say that it was a joint bond, for if the parties are liable for only the separate and varying sums in which they justify, it is a several obligation only. Such a construction would require as many different kinds of judgments rendered on a joint suit as there are geometrical combinations in the number twenty-five—which is the number of defendants. This of itself renders the construction contended for such an absurdity as to compel us to abandon it for one more reasonable.

We think, therefore, that this is a joint and several bond for thirty thousand dollars, and that each and all of the defendants are liable for that sum, and the sum set opposite their respective names is to show the sums for which they intended to justify and to fix their liabilities towards each other in the event of the collection of the penalty and the necessity for a contribution and settlement. This would make the bond effectual for its avowed purpose, give a reasonable construction to all its parts, and destroy none of its provisions. We can see no other interpretation that would not lead to inconsistencies and absurdities utterly irreconcilable with reason and honesty.

The defendants by their brief make the objection to the recovery in this case that the bond, though dated on the twenty-sixth of June, did not take effect until the thirtieth, and that some of the breaches complained of may have occurred between those dates, and that for such breaches they would not be liable. We think the general doctrine is that a sealed instrument takes effect from its date, though the delivery may have been postponed to a subsequent time, but in any event such a defense as the one insisted upon can be made only by answer setting up the facts.

While we do not deny that an obligee of a bond has "the

right to stand upon the very terms of his contract," and that he would not be liable for breaches of its provisions which may have occurred prior to its execution, we can not see the application of this principle to the facts of this complaint. All the breaches are alleged to have occurred subsequent to the date of the instrument, and while the defendant Slocum was in office, and unless the facts should show a different case than the one made by the complaint we think the plaintiffs have a right to recover.

We have thus far discussed the liabilities of the defendants, and the right of the plaintiffs to recover. There remains one question as to the pleadings raised by the third ground of demurrer, which is that the complaint is ambiguous, uncertain, etc. We must conclude that this point is well taken. The complaint contains four counts, setting up claims for recovery, but whether they are really one claim stated in different forms, or separate and distinct claims, it is difficult on reading the complaint to discover. Whether the plaintiffs intend to say that they have suffered losses in the aggregate, amounting to fourteen thousand dollars, or whether they intend to fix them at eight thousand, or five thousand dollars, it is impossible to tell on a comparison of the counts with one another. The rule under the code allows a party to state as many causes of action as he may have, if they are of a character to be properly combined in the same complaint, but it does not permit a party to set out the same cause under different forms. That is in fact the change in the form of pleadings introduced by the code, and it is one which the courts incline strictly to enforce.

The grounds of recovery urged in the first and second breaches of the bond alleged by the complaint are substantially the same. Proof which would entitle the plaintiff to recover under one would equally apply to the other. One alleges that Slocum had the money and refused to pay over, the other that he had the same amount collected from the specified sources and refused to pay over. The ground of recovery is not that it was collected by him from any particular source, but that he received in the alleged capacity and refused or neglected to disburse. They are there-

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fore obnoxious to the objection of pleading the same cause of action in different forms, and clearly improper. The rule is, that it is considered no variance from the proof if the facts show a substantial right to recover under the allegation, and the necessity of having various forms of stating the same cause of action is thus fully obviated. The demurrer in this particular we think well taken and is sustained.

The cause will be remanded with directions to require the complaint to be amended and made more definite, and upon complying that the plaintiffs proceed with their action.

THE PEOPLE v. MICHAEL DUNN.

JURY.—It is error for the court to draw a jury from a list prepared by the judge and sheriff until the regular panel is exhausted; and that fact must appear from the record.

INSTRUCTIONS—REFUSAL.—Upon the trial of an indictment for murder, it is the duty of the court to give an instruction to the jury, if requested, that they can find the defendant guilty of a less grade of offense than murder in the first degree, if warranted by the evidence; and a refusal to give such instruction is error. McBRIDE, C. J., dissenting.

APPEAL from the second district, Boise county.

C. B. Waite, district attorney, for the people.

E. W. McGraw, for the appellant.

CUMMINS, J., delivered the opinion of the court, McBRIDE, C. J., concurring in the judgment.

The grand jury regularly summoned prior to the convening of the February term, 1866, of the district court for Boise county, having transacted all the business properly coming before them, were, by the court, discharged, as were also the trial jury. Subsequent to this the crime of which defendant is accused was committed. Before the convening of the court the probate judge and sheriff of the county had prepared a list of one hundred names of persons competent to serve as jurors, as required by statute, and deposited the same in a box provided for that purpose, from

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which jurors could be drawn as occasion should require. From this number the first grand jury and the panel of petit jurors for the term were drawn, numbering in the aggregate thirty-nine, leaving sixty-one remaining in the box. After the homicide was committed, for which the defendant was subsequently indicted, the sheriff and presiding judge of the court prepared a list of names of persons, had them inserted in a venire, and summoned to attend as grand jurors. The grand jury thus obtained found the indictment upon which the defendant was put upon his trial. The petit jury before whom the defendant was tried and convicted were selected and summoned in the same manner; that is, the sheriff and the presiding judge of the court prepared a list of names of persons, deposited them in a box from which the clerk, under direction of the court, drew fifty names, placed them in a venire directed to the sheriff, and from this list of persons who were summoned was obtained the trial jury. It nowhere appears upon the record in this court that the list of one hundred names, prepared anterior to the first day of the term by the probate judge and sheriff, and deposited in a box, to constitute a jury list as provided by the jury act, was exhausted before the district judge and sheriff proceeded to prepare the list of jurors out of which the grand and trial jury were formed. Whereupon the defendant assigns as error, among others by which he has been aggrieved, that he has not had the benefit of a jury drawn in accordance with the statute; that he has not had the benefit of any one of the one hundred names deposited in the jury box, and yet it does not appear that those names were exhausted. For aught that the record shows, there were yet remaining in such box sixty-one names, which, under the provision of the statute, should have first been drawn and passed upon as jurors before the court could order the judge and sheriff to prepare a list of names from which to summon a jury, as was done.

Section 6 of the act concerning jurors provides that "when at any term of the district court, for the want of an assessment roll, or sufficient time is not permitted in which to prepare and draw a list of jurors as provided in this act,

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or when from any cause which may appear satisfactory to such district judge, such list has not been prepared or drawn, or the sheriff has not summoned such jurors, or the names selected as jurors placed in such box be exhausted, it shall be lawful for such district judge and sheriff to prepare a list of the names of a sufficient number of persons competent to serve as trial jurors, and deposit such names in a box, and at any time during the term of the court when a jury shall be required, names of persons shall be drawn therefrom," etc.

Substantially the same provision is made in the eighth section of the act relating to grand juries, under similar circumstances. "When from any cause which may appear satisfactory to such district judge," is the language of the act, he may proceed with the sheriff to prepare the list. Certain enumerated contingencies must exist, without which the district judge was not authorized to thus proceed. If there remained sixty-one names, or any other number, in the jury box yet undrawn, it was improper for him to proceed under section 6 above-quoted, until they had been drawn and passed upon, when, failing to obtain a jury, the judge would be authorized, in conjunction with the sheriff, to prepare such list. This state of facts must appear affirmatively upon the record. They are in the nature of circumstances necessary to give jurisdiction, and hence can not be presumed. A different construction of this act would put it in the power of the district judge and sheriff to prepare a jury at any time to subserve personal ends, and thus render our jury system an engine of oppression instead of an institution by aid of which to redress wrongs.

Clearly, then, this action of the court, or of the judge, was an error to the prejudice of the prisoner, and of which he might justly complain. It was a denial to him of a substantial right, to the benefit of which he was entitled under the law.

This is sufficient upon which to reverse the judgment of the court, but one other error is presented by the record which it is proper here to comment upon and definitely settle. I refer to the refusal of the court to instruct the jury, as asked by the defendant, that they could, under this indict-

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ment, find the defendant guilty of an offense of a less grade than that of murder in the first degree, if warranted by the evidence. It is for the court to determine what effect it should or will have upon the minds of the jury. The statute expressly declares that it is for the jury to say by their verdict what grade of offense has been committed, properly included in the crime charged in the indictment. It is not improbable that the jury should see extenuating circumstances in a given detail of testimony sufficient, in case of felonious homicide, to reduce the crime below that of murder in the first degree, and still the court be as thoroughly convinced that there was not a mitigating fact proved. It is a wise provision of the law made in favor of the prisoner, and he is entitled to its full benefit in all cases of trial under an indictment for murder, and should be given, more particularly when asked by the prisoner.

There are several other questions raised by the bill of exceptions, of great practical importance to the profession as well as to the public, but which we feel compelled to pass over in silence, owing to the dearth of authorities to which we have access. I refer more particularly to the questions involved in the instructions asked by the prisoner and refused by the court, in relation to the defense of insanity as set up on the trial.

Judgment reversed and new trial ordered.

Opinion by McBRIDE, C. J.:

I concur in the judgment rendered in the above case, but do not concur in that part of the opinion in relation to the right of the court to deny the instructions as to the different degrees of murder. A court is not bound to give instructions based on a supposed state of proof that does not exist.

A defendant may insist on instructions that are sound law, in the abstract, but unless they have some application to the proof in the case, the court should refuse them as having a tendency to confuse and mislead the jury. In the trial of a prisoner on a charge of murder, and involving the penalty of death, while it is safest to give him the benefit

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of all presumptions, yet if the court sees no evidence to reduce the grade of the offense, it has the right to withhold an instruction which presupposes such testimony. To entitle a defendant to an instruction it must be good law and be based on the facts of the case also. There is nothing in this case which satisfies me that the court below erred in this particular. The defense made by the testimony as shown by the transcript was one of insanity only, and under that the prisoner was entitled to an acquittal or he was guilty as charged in the indictment. Judging this case from the testimony embodied in the record, I see no reason to think that the court below erred in refusing the instructions.

JAMES FLANNAGAN v. JULIUS NEWBERG.

ATTACHMENT—DISSOLUTION.—A writ of attachment improperly issued should be dissolved on motion.

CUMULATIVE EVIDENCE.—When newly discovered evidence relates to a substantial point or particular fact which was inquired into on the trial, it is cumulative.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PRACTICE.—If the newly discovered evidence brings to light some new fact bearing upon the main question at issue, and would be likely to change the result, a new trial should be granted.

APPEAL from the first district, Nez Perce county.

Curtis & George, for the appellant.

A. Heed, for the respondent.

KELLY, J., delivered the opinion of the court, **McBRIDE, C. J.**, and **CUMMINS, J.**, concurring.

This action was brought by plaintiff as assignee of a promissory note for six hundred and twenty dollars, made by the appellant March 27, 1863, and payable to one E. Malony or order, and transferred by the payee to this plaintiff (appellee) some time after its maturity. The note and one hundred and fifty dollars cash were given for one half of a pack train, and was to become due when the train returned from Florence to Lewiston. The note was left in

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the hands of James O'Neil for safe keeping until the return of the train, and remained in O'Neil's hands until about the first of November of the same year. The note was assigned to plaintiff October 10, 1863. The plaintiff, Flannagan, at the time of commencing the suit, sued out a writ of attachment and levied upon the property of defendant. The ground for issuing the attachment, as set forth in the affidavit, is that the defendant was about to sell, convey, or otherwise dispose of his property with intent to hinder, delay, or defraud his creditors.

The answer of the defendant admits the making of the note, but sets forth that the note had been paid while in the hands of O'Neil, and defendant was fully discharged from said indebtedness and the plaintiff had full notice.

The defendant on the nineteenth of December moves to dissolve the attachment on the ground that the facts upon which the attachment was issued did not exist, and the affidavit upon which the writ issued was insufficient and shows no cause for an attachment. This motion was heard upon affidavits submitted by each party, but was denied by the court, to which ruling the defendant's counsel duly excepted. This cause was tried by a jury, and a verdict found for the plaintiff for the amount prayed for in the complaint. The defendant moved for a new trial on the ground that the verdict was contrary to evidence, and also on the ground of newly discovered evidence. The evidence to support the attachment should show that the defendant had or was about to dispose of his property to hinder, delay, or defraud his creditors.

The affidavit of the plaintiff Flannagan shows that the defendant Newberg denied the indebtedness upon which the suit was brought, and had denied such indebtedness from the time he made the second trade with Malony, which the plaintiff well knew; that because the defendant denied such indebtedness and refused to present an order for said note, and declared his intention to go to Europe, the plaintiff was induced to believe the defendant about to dispose of his property to hinder, delay, or defraud his creditors; that defendant told plaintiff he had gold dust on deposit in

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the town of Lewiston subject to attachment; that defendant had sold his pack train to one L. P. Brown, and that he had no property aside from money or debts that he (plaintiff) knew of.

The testimony of the other witnesses on the part of the plaintiff corroborates the statement that the defendant had declared his intentions to close up his business and make an extensive tour in Europe. The evidence upon which this attachment must be sustained can not go to any other ground for the issuance of an attachment except the one alleged in the affidavit. That portion of the evidence which relates to the defendant's leaving the territory is entirely irrelevant, because no such ground is alleged in the affidavit.

The plaintiff swears that he had made diligent inquiry in the town of Lewiston and was unable to find where the defendant's gold dust was deposited. He does not set forth what diligence he had used either generally or specially. He does not say that the defendant refused to inform him where his gold dust was deposited, or that he ever made inquiry of the defendant, or that the defendant ever refused to tell him of any other property that he owned. The plaintiff does not say he made inquiry at the most usual places of making deposits in the town of Lewiston, to learn the whereabouts of defendant's gold dust, or that if defendant had gold dust on deposit it was deposited in some unusual manner, either by the enjoiment of secrecy or making the deposit with some person not in the habit of receiving deposits.

On the other hand, the defendant shows that his gold dust was on deposit, as he stated to plaintiff, at the assay office, and in the custody and safe of the most public hotel-keeper in said town without any enjoiment of secrecy. The defendant also shows by twelve witnesses who are acquainted with the defendant's dealings, and many of them have had extensive mercantile dealings with him for a long time prior and up to the time of the issuance of this attachment, that the defendant was always honorable in his dealings, paid his debts, had property to a considerable amount, and

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never concealed or made any fraudulent disposition of his property; none of which is denied by the plaintiff's evidence, except by the testimony of one witness.

The facts as shown by the testimony are that the defendant never sold or disposed of any property to hinder, delay, or defraud his creditors. That he denied the indebtedness to plaintiff was a right which the defendant had, and of itself is no ground for the issuance of an attachment. The refusal of the judge below to dissolve the attachment was clearly an abuse of discretion, which should be corrected by this court. The point raised by the appellant's counsel that the affidavit is made in the alternative was not taken in the court below, and we have concluded to pass that question, as there is sufficient ground to dissolve the attachment upon the evidence submitted.

The evidence on the trial of this case showed that the appellant on the twenty-sixth day of March, 1863, bought an undivided half interest in the pack train of one James Malony, for which he gave the note sued on in the plaintiff's complaint; that the note was to become due after the train had made one trip to Florence, and was placed in the hands of James O'Neil until that contingency should happen. Malony gave Newberg, the appellant, a bill of sale of said half interest. The purchase price was mentioned in the bill of sale and in the note. Newberg and Malony went with the train on this trip, and when they arrived at Warren's diggings they made another bargain and Newberg agreed to buy the whole train. Malony could not write, but called on A. R. Riddle, an acquaintance of both parties, but who never had any business relations with either, to draw up the writings between the parties. Riddle testifies that the bargain was stated over to him in this wise:

“When they arrived at Warren's they made another trade, and Mr. Newberg bought all the animals, and they settled up all their business transactions, and mention was made of the note that was left with James O'Neil, and a mule and another animal or two that was left on the road, and the liabilities of the train that had accrued, was all I heard mentioned in the settlement. Newberg was to pay

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Malony fifteen hundred dollars and take his note that was left with O'Neil, and the mule and the animals left on the road, and the train, and to pay the liabilities. This was the sum and substance of the settlement that they had in my presence."

Riddle was shown the second bill of sale and recognized it as the one given at the time this trade was made, and says that he drew up the bill of sale. He also recognizes the one thousand dollar note as the one given at that time which he drew up for the parties. Newberg paid five hundred dollars down and gave the one thousand dollar note as the balance of the one thousand five hundred dollars. Riddle says:

"There was mention made of the first note, and I was desired to insert it in the bill of sale, but I omitted to do so. Newberg spoke of it afterwards. I told them, as they were partners, and both acquainted with O'Neil, that there would be no difficulty in Mr. Newberg's getting possession of the note. They both concurred with me in that opinion. The settlement was intended to render null and void the transaction that they had at Lewiston."

The first bill of sale conveyed an undivided interest in nine mules and thirteen horses for the consideration mentioned in the first note, to wit, six hundred and twenty dollars, and one hundred and fifty dollars in cash—all branded E. M. The second bill of sale conveyed ten mules and sixteen horses branded E. M. for the consideration of fifteen hundred dollars, and Newberg was to pay the outstanding expenses against the train.

James O'Neil testifies that he saw Malony after the last sale was made; that he then had the six hundred and twenty dollar note and first bill of sale in his hands and Malony said nothing about it, but told him he had a one thousand dollar note on Newberg. Newberg had previously told him the note was paid, but it was when O'Neil was at Florence and he did not have the note with him; that Newberg afterwards sent an order for it; that when Flannagan demanded the note he refused to give it up because

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Newberg claimed that it was paid. Flannagan gave him a bond to indemnify him and he then gave it up.

Galbraith testifies that some time in June he asked Malony how he was getting along with Newberg. He said, I have sold out and have Newberg's note for one thousand dollars; he paid me five hundred dollars cash. Malony said nothing about the six hundred and twenty dollar note left with O'Neil.

Kavanaugh gave his deposition before the trial on the supposition that he would not be present at the trial. In taking this deposition the plaintiffs were present and had the benefit of a cross-examination. In this deposition he testifies that he was not present when the writings were drawn up by Riddle. That after they had traded, Malony turned the train out to him for Newberg, and Malony said Newberg had squared up with him like a man. As the defendant was about to read this deposition on the trial, it was discovered that Kavanaugh was in the room, and the defendant was then required to dispense with the deposition and put Kavanaugh on the stand to give his testimony orally. Kavanaugh then swore that he was present at the time the writings were drawn up, and that the one thousand five hundred dollars was given by Newberg for one half the train.

Sweeny testifies that he assisted Malony and Newberg to settle, and found four hundred dollars due Malony on a one thousand dollar note. This was an arbitration settlement in regard to matters that took place after the sale of the train at Warren's and dated back to that time—but the six hundred and twenty dollar note was not included. Sweeny says that he understood that the one thousand dollar note and the five hundred dollars cash was for Malony's half interest in the pack train sold by Malony to Newberg and its freight earnings.

Both notes and both bills of sale were given in evidence to the jury. The first bill of sale is for an undivided one half of the train. The second bill of sale is for ten mules and sixteen horses, which was proven to be the whole train.

Upon a motion for a new trial, the defendant sets forth

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as the grounds of his motion that he was taken by surprise in the testimony of Kavenaugh, inasmuch as he did not know that Kavenaugh would be present at the trial; that his testimony was different from his statement which he had previously made, and materially different from his deposition; also that he could prove by newly discovered evidence which he could not by due diligence have procured at the trial, to wit, the testimony of John McConnell, "that Malony said to McConnell in the month of September, 1863, that he [Malony] had no demand against him [Newberg, the defendant] whatever." Those facts are fully set forth by the affidavit of defendant and the affidavit of McConnell.

The plaintiff objects to this newly discovered evidence on the ground that it is cumulative. This admission of Malony was prior to his transfer of the six hundred and twenty dollar note to Flannagan, and a new and independent fact unknown to the defendant at the time of the trial. Had this admission been proven at the trial, the testimony of other witnesses to the same admissions would be merely cumulative. In the case of *Aitken v. Bemis*, 3 Wood. & M. 348, Judge Woodbury said: "The meaning of the rule can not be to exclude as cumulative newly discovered evidence of subordinate points or facts bearing on the general question, for in such views no trial for new evidence could ever be obtained; all new evidence relating, as it must, if it be pertinent, to the general ground or general fact put in issue before. But it must mean that new evidence to a subordinate point or particular fact was before gone into; because it is then cumulative, or additional, as to that fact."

In the case of *Gray v. Harris*, Nev. 509, Chief Justice Lewis says: "To render evidence subject to this objection, it must be cumulative, not with respect to the main issue between the parties, but upon some collateral or subordinate fact bearing upon that issue. If the newly discovered evidence brings to light some new fact bearing upon the main question, and it would be likely to change the result, a new trial should be granted."

The facts claimed to have been newly discovered are cer-

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tain admissions of Malony, the payee mentioned in the note in dispute, made before the payee transferred the note to the plaintiff. There was no testimony introduced on the trial of such an admission, and the defendant swears it was not discovered until after the trial. There is considerable doubt as to whether the evidence would support the verdict rendered in this case, but as there is sufficient ground for a new trial which ought to have been considered by the court below, we shall set aside the judgment on that ground, and a new trial is therefore ordered and the attachment dismissed.

Judgment reversed.

THE PEOPLE, APPELLANTS, v. JOHN WILLIAMS, RESPONDENT.

INDICTMENT—MOTION.—For the purposes of a motion to set aside an indictment, the facts stated in it are to be taken as true.

TIME.—If there was no law defining the crime and imposing a penalty at the time the offense is alleged in the indictment to have been committed, time is material, and the indictment should be set aside.

MOTION.—A motion to set aside an indictment, based upon objections going to the merits of the case, can be made at any time, either before or after judgment.

APPEAL from the second district, Boise county.

C. B. Waite, district attorney, for the people.

S. A. Merritt, for the respondent.

MCBRIDE, C. J., delivered the opinion of the court, **CUMMINS, J.**, concurring, **KELLY, J.**, dissenting.

This case comes up on appeal from a decision of the district court, quashing the indictment.

The following are the facts: The defendant, John Williams, was charged by the indictment with the crime of highway robbery, committed in the month of September, 1863, in the county of Boise, territory of Idaho. The indictment was found at the July term, 1865, and the defendant, being in custody, pleaded not guilty. Subsequent to this plea, but before trial, the defendant, by his counsel, moved to

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set aside the indictment. The motion was sustained, and the prisoner ordered to be discharged. This ruling was excepted to by the attorney for the people, and the case stands for decision upon this motion, and the alleged error of the court below in granting the same. Preliminary to an investigation of the main question which is involved in the decision below, it will be necessary to refer to some points raised by the district attorney in the brief by the appellants.

It is claimed by the appellants that though the indictment charges the offense to have been committed in September, 1863, the time is no material ingredient of the offense charged, and that the indictment would be supported if the proof should show that the crime was committed within the statutory time, although not upon the day charged, and as there was no proof—there having been no trial—that the offense was committed in September, 1863, when it was claimed no law existed for its punishment, that the court erred in granting the motion, as it might have appeared that it was committed after that time, and when no such objection would lie. This is an error. For the purposes of the motion, the court must take the facts as stated in the indictment to be true. Time is material in this offense, and though it need not be proved as laid strictly, still where the time becomes a question of materiality the court must assume that it is stated according to the fact, and if there was no law defining this crime, and inflicting a penalty at the time when it is alleged to have been committed, then the indictment should have been set aside, and there is no error.

The second point of the appellant is that the defendant having been set at liberty under the order of the court below, the court should not take cognizance of this appeal. This appeal is taken by the people, and the district attorney has the right, if he chooses, to dismiss the appeal; but to prosecute the appeal, and deny the effect of its design, is certainly not allowable.

A third point assigned is that the motion was made to set aside the indictment after the defendant had entered his plea of not guilty, and that the motion came too late, and, therefore, the order should have been refused, and now re-

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versed. The statute settles this question—and reason as well; the objection going to the merits of the prosecution could be raised at any time before or after judgment. It would have been the duty of the court to consider it any time during the progress of the trial, and to have arrested the judgment after verdict. It would be the height of absurdity to say that a court might be fully convinced that it had no authority to pass sentence upon a case, yet must proceed to try a criminal because it had begun the proceedings.

Having disposed of these preliminary questions, it remains to be decided whether there was any law for the punishment of defendant for the offense charged in the indictment. On the third day of March, 1863, congress organized the territory of Idaho by cutting off certain territory from the already organized territories of Washington, Dakota, Nebraska, and Utah. The territory of Idaho then became a separate political community, and the power of government, of making and enforcing statutes, of preserving the rights of the people and punishing wrong-doers, was vested in the citizens of the territory in the manner prescribed by the organic act. Did this segregation of the territory of Idaho from the other territories named leave it without any criminal code? It undoubtedly was a repeal of the several organic acts named—they no longer had any form or validity, had been superseded and become nullities. How they could cease to exist, and yet laws remain in force, deriving their validity from authority conferred by them, we can not understand. It would be to extinguish the fountain and insist upon the rivulet continuing its flow—cutting off the source of life and affirming continued vitality. To provide against any such hiatus in the criminal code, where there is a transition from one form of government to another, it is always provided that the remedies shall subsist in full force. Thus in organizing a state government the universal practice is to continue, by special provision, the pre-existing laws; so in organizing new territories the usual provision is to continue the laws of the old political division until the enactment of new ones.

In organizing the territory of Oregon, in 1848, congress

Points decided.

affirmed and continued the laws of the former provisional government until they should be altered or repealed. The uniform practice in this respect conclusively establishes, we think, the principle that the laws of the old organization have no force in the new political community unless by special provision. We are now speaking only of criminal laws. In civil matters the questions of rights and remedies are so different that the same rules do not necessarily apply.

In the act organizing this territory no provision is contained recognizing the former laws. Indeed, to have done so would have given vitality to four different codes of law in different parts of the new territory. Confusion would have followed inevitably, and the fact of this difficulty sufficiently accounts for the omission on the part of congress to provide for their continuance until the new legislature should provide for the wants of the country.

There is no similiarity between this case and that of a conquered or ceded territory whose sovereignty is transferred from one authority to another. Then the laws pass with the people and the soil—but not so when the sovereign authority dismembers a piece of territory and makes no provision for the new community.

We are therefore of opinion that there was no statute punishing the offense charged in this indictment at the time it was alleged to have been committed, and that even if the facts alleged be true no sentence could be pronounced. The judgment of the court below will therefore be affirmed.

Judgment affirmed.

**THE PEOPLE, RESPONDENTS, v. R. J. BUGBEE ET AL.,
APPELLANTS.**

CAPACITY TO SUE.—The people have the legal capacity to sue upon breaches of bonds given by defendants in criminal actions.

BOND—VARIANCE.—The fact that a name appears in the body of a bond that is not subscribed to it, or that some or all the names subscribed to such bond do not occur in the body of the same, does not in the least affect the liability of those who executed and delivered it.

ERASURES—INTERLINEATIONS.—Erasures and interlineations appearing in an obligation at the time of its signing can not in any manner affect the liability of the subscribing parties.

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BOND.—Bond was executed and delivered into the custody of the clerk of the court in which the defendant was to appear; the parties executing such bond as sureties took and subscribed a justification on such bond which was administered by the judge of the court, and was by him approved at the time: *Held*, from the facts the court very properly found that the signatures were genuine, and that the execution of such bond was sufficiently proven.

APPEAL from the second judicial district, Boise county.

Rosborough & Preston, for appellants, cited, on the question of variance, 1 Greenl. Ev., sec. 66; *Lewis v. Myers*, 3 Cal. 476; *Gillham v. Gray*, 13 Ill. 705; 2 Greenl. Ev., sec. 11; and on the question of liability of sureties, *People v. Buster*, 11 Cal. 215; 2 Pars. on Cont. 16, 17; *Miller v. Stewart*, 9 Wheat. 680; 3 Pars. on Cont. 17; *Fourman v. Faggott*, 3 Scam. (Ill.) 349.

C. B. Waite, district attorney, for the people.

CUMMINS, J., delivered the opinion of the court, **McBRIDE, C. J.**, and **KELLY, J.**, concurring.

The complaint in this suit is upon a bond given by the defendants as security for the appearance of R. J. Bugbee before the court, and that he would, at all times, hold himself subject and amenable to the orders of the same, and alleging as a breach of such bond that the said Bugbee was duly called on the thirty-first of July, 1865, to appear for trial, but failed to appear, whereupon the bond was declared forfeited by the court. To this complaint there were two demurrers interposed by separate defendants, but based substantially upon the same grounds.

One objection to the complaint raised by both demurrers is that the plaintiffs named therein have not legal capacity to sue or maintain an action in any court. The power or right of the people to commence and maintain suits to recover the penalty of forfeited recognizances of this character, as also the proper construction to be given to, or the effect of that part of the bond where it is declared that the parties are liable for the sums set opposite their names respectively, have been fully determined in the case of *The*

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People etc. for the use of Boise county v. Alfred Slocum et al., decided at this term. We will therefore do no more than simply state that the people have the legal capacity to sue upon a breach of this character of bonds. They are the proper obligees of such bonds, and hence they are the beneficial party in whose name the suit ought to be prosecuted.

The only remaining point raised by the demurrer, which it is necessary for us to examine, is that the "complaint does not state facts sufficient to constitute a cause of action." On a careful examination of this declaration we see no material departure, in the statement of the grounds upon which this suit is based, from the provisions of section 39 of the civil practice act. The bond is declared upon according to its legal effect by a clear and concise statement of the conditions and the breach, and of all the other facts necessary to entitle the plaintiffs to recover. The parties liable under this bond, and who are properly made defendants in this action, are those persons subscribing their names to the same. The fact that a name appears in the body of a bond that is not subscribed to it, or that some or all of the names subscribed to such bond do not occur in the body of the same, does not in the least affect the liability of those who executed and delivered it.

Several other points were made on the argument under this clause of the demurrer, but which it is unnecessary to notice here.

The last point which it will be necessary for us to examine is the objection made by the defendants to the introduction of the bond sued upon. They urge against its introduction several reasons, the most material of which are: 1. That the "erasures and interlineations appearing on the face of the bond were not accounted for nor explained;" and, 2. "The execution of the bond was not shown or the signatures of the parties proven."

As to the first of these objections, it appears on an examination of that instrument that the name of "J. McGinley" is erased, which occurred in the body of the bond; and below all the other names, making the last name in the body of the same, as well as at the end, is interlined the name of

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“H. T. Smith, eight hundred dollars.” The former of these names is not subscribed to the bond nor to the justification, while the latter appears in both places. The testimony of the deputy clerk of the district court on the trial was to the effect that he was at the time of the execution of the bond, and had been ever since, deputy clerk of the district court, had had general custody of the same all the time, except a few days when it was in the hands of the district attorney, while he was preparing the complaint in the action. The deputy clerk further testifies that while it was so in his custody there were no erasures or interlineations made in it. And to the same effect is the evidence of the district attorney while the bond was in his possession. This, then, establishes the fact that this bond could not have been changed or altered in any respect at any time subsequent to its execution. Whatever erasures or interlineations were apparent on the face of that instrument were evidently made anterior to its execution. And certainly nothing of this kind which was in the obligation at the time of its signing could, in any manner, affect the liability of the subscribing parties. As appears from the testimony, the bond produced on the trial was the identical bond executed by the defendants.

The second objection, as above stated, went to the proof of the signatures of the parties. This bond was executed and delivered into the custody of the clerk of the court before whom the defendant, Bugbee, was to appear, on the fifteenth day of July, 1865. The parties subscribing it also take and subscribe a justification that “they are each worth the sums set opposite their names respectively in the foregoing bond.” This oath was administered by the district judge, and the bond was approved by him at the same time. The bond was given for a purpose and under circumstances authorized by law. From these facts the court found, and very properly we think, that the signatures were genuine and that the execution of such bond was sufficiently proven. The bond was therefore properly admitted in evidence.

There were some other objections raised on the motion for a new trial and also on the argument in this court, but all either directly or indirectly arising upon the same

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grounds upon which were based the objections we have already examined and determined. Hence, we have not thought it necessary to express an opinion upon these points.

The judgment of the court below was properly rendered against the defendants; but a clerical error seems to have occurred in the entry of such judgment in the records of the court. It should have been rendered jointly against all the defendants named in the action, that their joint property may be liable to execution; and severally against the defendants who were served with summons. The bond is made by express terms joint and several.

The judgment of the court below is affirmed, with instructions to amend the same as indicated in this opinion.

B. F. LAMKIN v. E. C. STERLING.

STATUTES—CONSTRUCTION OF STATUTES.—It is the duty of the courts to so construe statutes as to make them effect their evident purpose, and harmonize their various provisions with one another, and where the application of these rules still leaves a question of doubt, the principles of justice must determine the doubt.

LEGISLATURE—CONSTITUTIONAL LAW.—The legislature may change the manner of the payment of territorial warrants—may issue bonds payable at a different time than the original warrant—but they can not by any provision relieve the territory from the obligation to pay. Legislation of that kind would be to “impair the obligation of contracts,” and would be simply void.

REPUDIATION.—The territory can no more repudiate and refuse to pay her debts than a private individual.

THIS cause was brought into this court on stipulation, without being first submitted to the court below.

E. J. Curtis, for the relator.

W. A. George, for the defendant.

MCBRIDE, C. J., delivered the opinion of the court, CUMMINS, J., concurring.

This is an application for a mandamus to compel the defendant, Sterling, to pay a certain warrant held by the

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plaintiff against the territorial treasurer, and involves the construction of the funding act passed by the legislative assembly, January 12, 1866. That act provides that no warrant drawn before its passage shall be paid by the treasurer; except in the manner provided in the act, which is by their conversion into bonds.

The provision, however, in relation to the debt to be funded or converted into bonds, only includes so much of the territorial debt as had accrued up to the first day of December, A. D. 1865. So that by the literal terms of the law, no warrants can be funded, or redeemed by the bonds of the controller, of date subsequent to December 1, 1865, and none can be paid by the territorial treasurer of date prior to the twelfth day of January, 1866. The question involved in this case is, What is the condition of the warrants drawn between these dates? They can not be redeemed by bonds, and the treasurer is forbidden to pay them—indeed, they appear to be wholly overlooked.

It is the duty of the courts to so construe statutes as to make them effect their evident purpose and harmonize their various provisions with one another, and when the application of these rules still leaves a question of doubt, the principles of justice and reason must determine the doubt.

The object to be effected by the act in question was to provide for the payment of the territorial indebtedness by converting it into interest-bearing bonds, and to prohibit the payment of that indebtedness in any other manner. In proceeding to secure this declared purpose, it, however, only authorizes the redemption of warrants dated prior to December 1, 1865. It would seem, therefore, if we give the act a literal construction, that the legislature intended to forbid only the payment of such warrants as they had ordered to be redeemed by bonds, or that they meant to repudiate entirely the debt which might accrue from the first day of December, 1865, until the passage of the act. Aside from the provision made by this act, all warrants are payable in their regular order, and if in the declaratory part of the law the legislature had manifested a clear intent to change this order, if it failed to carry out the purpose by

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providing proper means, the act would fail for want of machinery to give it effect.

In the first place the legislature would have no right to so change the mode of payment as to destroy the debt. They may change the manner of payment, may issue bonds payable at a different time than the original warrant, but they can not by any provision relieve the territory of the obligation to pay. Any legislation of that kind would be to "impair the obligation of contracts," and would be simply void. Hence, when in this act they forbid the treasurer to pay warrants of date prior to its passage, the language must be understood as applying only to such warrants as it is provided shall be redeemed in the manner prescribed, to wit, the issue of bonds. If the broad language of the law is to be applied to the indebtedness not redeemable by bonds, then it is an attempt to repudiate warrants issued up to the twelfth of January, 1866, and after the first day December, 1866, are void for want of authority.

The territory can no more repudiate and refuse to pay her debts than a private individual. If she intended to redeem all her outstanding indebtedness up to the date of the approval of the act of the twelfth of January, 1866, she failed to provide for doing so by bonding any of a later date than the first of December, 1865, and the subsequent indebtedness is in precisely the same condition as if the funding act had never passed. The intention was not so consummated as to make it effective for the purpose.

We are of opinion, therefore, upon review of this case, that the debt of the territory existing prior to the first day of December, 1865, was by this act provided to be paid by the issue of bonds; that subsequent indebtedness is untouched by the act, and that the warrants drawn should be paid in their order. The facts shown in this case entitle the complainant to the mandamus prayed for, and the writ will issue accordingly.

KELLY, J., did not sit at the hearing of this case, being the owner of a warrant of a similar character.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT,
JANUARY TERM, 1867.

PRESENT:
HON. JOHN R. McBRIDE, CHIEF JUSTICE.
HON. MILTON KELLY, } JUSTICES.
HON. JOHN CUMMINS, }

WILLIAM ATKINS ET AL. v. L. HENDREE ET AL. ✓

MINING LAW—TRESPASS.—If plaintiffs performed the acts required by law to locate a quartz claim, except the labor—the year not having expired—and the defendants undertook to take possession of the ground, they were trespassers.

DEFENSE—ABANDONMENT.—Defendants in an action for the recovery of a quartz claim may show acts of abandonment on the part of plaintiffs, or that the lode which they claim is separate and distinct from the one held by plaintiffs.

MINING LAW—LOCATION.—From the time that a lawful location of a quartz claim has been made, being a space of two hundred feet in length and fifty feet on each of the stakes, the claimant becomes the owner as against any other claimant of the soil embraced in those limits.

IDEM.—The claimant is allowed to hold but one ledge by location, but the fact that other ledges may exist within those limits must first be established before a subsequent claimant has any lawful right to pass into those boundaries which otherwise must be sacred to the first location.

IDEM—INSTRUCTIONS.—The following instruction was given by the court: “No quartz claim can exceed two hundred feet in length along the lead or lode, and if the jury believe from the evidence the claim of A. was pur-

Argument for Plaintiffs.

posely located to include a greater number of feet than two hundred, then the location is an attempted fraud upon the provisions of the law and the rights of others, and the location is null and void as against subsequent locators, and the jury must find for defendants:" *Held*, that this was erroneous. To claim more than the law allows is no fraud on others, for they have the same means of ascertaining the attempted fraud that the other has of committing it.

IDEM.—The fact of a separate and distinct lode must first be proved before the claimant of such lode is entitled to enter the bounds of a claim already located.

ADJOURNED into this court from the third judicial district, Owyhee county.

Ejectment for a mining claim. Plaintiffs claim to have located some time in the month of March, 1866, a quartz lode, which they denominated the "First extension south of the Dahlgren." This claim consisted of two hundred feet in length with the width allowed by law. They performed no work or labor upon this claim, except staking it off, up to the time of defendants' entry, which was about the seventh of September, 1866. Defendants located a set of claims running at nearly right angles, across the line of plaintiffs' location, under the name of the "Silver Monarch." Their discovery shaft on the point where they claimed to have discovered the lode they located, and the only point where they have performed any considerable amount of labor or pretend to have found the lode at all, was within a few feet of the line between the stakes of the plaintiffs' location, but claim that their ledge is a separate one from that claimed by the plaintiffs. Trial by jury, and verdict for defendants. Plaintiffs move to set aside the verdict and for a new trial. The hearing of this motion was adjourned into the supreme court under section 326 of the civil practice act.

H. Martin, for the plaintiffs:

On motion for a new trial, and in weighing testimony, if it is found that the testimony fails to establish an essential fact in question, then a new trial must be granted. (*Hawkins v. Reichert*, 28 Cal. 539; *Bolton v. Stewart*, 29 Id. 618.) Where improper evidence is admitted injury is presumed,

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unless such presumption is rebutted by the record. (*Lally v. Wise*, 28 Id. 543; *Grimes v. Full*, 15 Id. 63.)

Stafford and McQuaid, for the defendants.

MCBRIDE, C. J., delivered the opinion of the Court, KELLY, J., concurring.

This is an action brought to recover a piece of mining ground containing a quartz lode, which the plaintiffs claim to have located and held under the quartz law until they were turned out of the possession and ownership by the wrongful acts of the defendants. The action is ejectment in the usual form under the code, and the issue is as to the plaintiffs' possession at the time of the alleged ouster. The defendants admit that they entered upon the premises in question, but allege that the same were vacant and open to claim and location at the time; and the acts of the plaintiffs were entirely insufficient to establish any legal right or possession to the same. On issue joined before the jury there were discussed, as appears by the record and the instructions of the court, these questions: 1. Did the plaintiffs comply with the requirements of the quartz law in the location of their claim? and if so, 2. Were the plaintiffs the owners at the time of the entry of the defendants upon the premises?

The verdict was general, and was for the defendants. Plaintiffs filed certain exceptions to the ruling of the court in its instructions to the jury, and on motion for a new trial urged those exceptions, and that the finding of the jury was in disregard of the testimony, as grounds for setting aside the verdict and ordering a new trial. The court below adjourned the case into this court for decision, and the question is upon the motion of the plaintiffs to vacate the verdict of the jury and the award of a new trial.

The principal questions involved in this case are such as arise upon the construction to be given to the quartz law.

The plaintiffs also complain of misconduct on the part of one of the jurors, but we think there is nothing which indicates corruption or willful wrong by the juror whose conduct is impeached, and that the charge, though quite natu-

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ral at the close of a hotly contested trial where the parties felt a deep interest in the result, is not sufficient to warrant the conclusion which the appellants draw from the facts. That portion of the case we dismiss from our consideration.

The ground upon which the plaintiffs except to the instruction of the court to the jury as being upon a supposititious state of facts, we think not sustained by an examination of the record, and we will scrutinize the objections to those instructions on the basis of their merits as expositions of law. Whether a given instruction can have any application to the case undergoing a trial will always be more properly determined by a judge who hears all the testimony than by an appellate court which has at least but a meager outline of the evidence before it. On such questions we would require a clear case of objectionable application of the law before we would disturb a verdict. The quartz law requires, in order that a party shall have the benefit of its provisions in acquiring title to mining ground, that he shall stake off the ground, and if, as in this case, it is a single claim, there shall be a stake of a certain size driven at each end of the claim; that he shall post a notice containing certain requisites on said stakes; that within the time limited he shall have the same recorded in the proper office, and that all these acts being performed, he shall be entitled to hold the ground so designated as real estate, upon the condition that within one year he shall perform one hundred dollars' worth of labor in the development of the same.

Now, if the plaintiffs performed these acts as required by law, except the labor, and the year had not expired within which this was to be done, and the defendants undertook to take possession of the ground, they were trespassers, and the plaintiffs are entitled to their remedy to recover possession. If the defendants can show some act of abandonment on the part of the plaintiffs, of the lode which they claim is separate and distinct from the one held by the plaintiffs, then they may by such showing defeat the plaintiffs' right to recover.

And in reference to the right of a locator of a claim to his ground, we think that for the space of two hundred feet

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in length and of fifty feet in width on each side of his stakes, from the time that a lawful location has been made, he becomes the owner as against any other claimant of the soil embraced within those limits. It is true that the law allows him to hold only one lode by this location, but the fact that two ledges exist within these bounds must first be established before the subsequent claimant has any lawful right to pass into them. If by going outside of these boundaries and tracing it into them he shows that another and distinct lode exists, then he may pass boundaries that would otherwise be sacred to the first locator. But until he does so he has no right to go upon the ground which the law has already given to his neighbor. What can be the use of the law which requires a party to stake out and define the bounds of his claim if those bounds are not to be respected, and are to be treated for the purpose of prospecting the same as any other vacant ground? It seems by the evidence contained in the record that if any ledge such as the Silver Monarch exists, or has been discovered, it is within the limits of the claim of the plaintiffs. The shaft of the ledge of the defendants is within a few feet of a line drawn between the plaintiffs' stakes, and no work has been done on the Silver Monarch claim outside of the boundaries of the Atkins claim on the Dahlgren. No lode was found outside and traced into those limits, but defendants enter upon the premises claimed by the plaintiffs six months after they had been attempted to be appropriated by the plaintiffs, and, discovering what they call a new ledge, insist upon their right to hold it in defiance of the plaintiffs' claim. This can not be allowed if the plaintiffs had any legal claim. If their location was lawful, and complied with the requirements of the statute, then the defendants were trespassers at the time of their entry. Hence, the question now is whether the plaintiffs complied with the law in reference to the location of quartz claims so far as to vest the right of ownership in these premises in the plaintiffs when the defendants made their entry, and did the jury disregard the law and the facts in rendering their verdict? In this connection we will observe that we think the court erred in giving the in-

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struction No. 2, asked by defendants, to the jury. That instruction was as follows:

“No quartz claim can exceed two hundred feet in length along the lead or lode, and if the jury believe from the evidence that the claim of plaintiff Atkins was purposely located to include a greater number of feet than two hundred, then the location is an attempted fraud upon the provisions of the law and the rights of others, and the location is null and void as against subsequent locators of the same ground, and is liable to subsequent location, and the jury must find for defendants.”

We do not assent to this view of the law. The provisions of the law require that the claimant should define the claim by stakes two hundred feet apart; that he should designate which is the beginning point in his notice, and give the direction, distance, etc. If he claims more than the law allows, it is void for the excess; but the notice does not claim all the ground between the stakes, but two hundred feet of ground running in a given direction from the place of commencement. To claim more than the law allows is no fraud on others, for they have the same means of ascertaining the attempted fraud that the other has to commit it. They can measure the ground and confine him to the limits prescribed by law, but to say that he shall lose his claim entirely because he may have included more than he can hold within his stakes by a few feet, or by ever so much, is to give protection to parties, subsequent claimants, who are not so likely to need it, as the prior locator is to be protected in his rights. If he has too much, it is easy to discover it; and all the benefit that a subsequent locator can claim is that he shall be entitled to maintain his right to the excess. We therefore proceed to inquire whether by the testimony the plaintiffs show a legal location of the ground.

Garlick was the man who made the location; and the testimony is that he was authorized by Atkins, the claimant, to locate for him; that using the south stake of the discovery claim of the Dahlgren, of which he was the discoverer, he posted the notice of the claim; that he also planted another

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stake about two hundred feet south of this, on the same day, and that on this stake a notice, similar to the first, was posted, claiming the two hundred feet of said lode described in them; and that afterwards the notice was recorded, and the oath of the claimant filed with the recorder as required by law.

These are facts which the defendants seem not seriously to have attempted to contest. That the defendants were advised of the plaintiffs' claim is clear, from the fact of their offer to purchase; and that in the original location the law was substantially complied with is too clear for reasonable dispute. The pretense that Atkins forfeited his claim because he may have included more than he could hold between his stakes we have already disposed of; and unless the defendants can show that there was an abandonment of the claim of the plaintiff, Atkins, prior to their entry, they were clearly trespassers upon his rights. Is there anything in this testimony that justifies the assumption of abandonment? We fail to see it. The only testimony bearing on the question was that referring to the negotiations for a purchase of his claim. Whatever loose conversation Atkins may have indulged in on that occasion, the fact remains that the defendants offered to buy, and that he declined to sell them his claim; and how this fact can be construed into an abandonment of it we do not comprehend.

We conclude, therefore, that at the time the defendants entered upon the premises they were lawfully held and owned by the plaintiffs; that the claim that the Silver Monarch is a distinct lode is one that gives the defendants no right to enter the bounds of the Atkins claim unless that fact was first established; and that the verdict in this case is in defiance of both law and the facts. Whether we suppose the jury to have found that there was no location, or that the manner of it was a fraud, or that it had been abandoned by Atkins—one or all of which they must have done to reach such a verdict—it matters not; it is unsupported and must be set aside.

We are of the opinion that a new trial should be had, and for that purpose return the case to the district court, with a mandate accordingly.

Statement of Facts.

**THE PEOPLE, RESPONDENTS, v. JOHN C. PAGE,
APPELLANT.**

EXCEPTIONS—ASSIGNMENT OF ERRORS.—Appellant may except to any erroneous ruling of the court below, but he must, in his assignment of errors in this court, specify and point out those upon which he relies, otherwise all such will be treated as waived.

INDICTMENT—CRIMINAL LAW—PLEADING.—P. was indicted under the latter clause of section 88 of the crimes and punishment act, in which indictment the crime was charged in the following language: “Knowingly and willfully did have in his possession and secretly did keep (enumerating the instruments), then and there being instruments for the purpose of counterfeiting uncoined gold,” etc.: *Held*, that this indictment was not sufficient, in not charging that these instruments were had by the defendant for the purpose of counterfeiting, etc.

IDEM.—A gross error on the face of the indictment is that it charges that the defendant is guilty of a “felony,” instead of naming the real offense—that of having and secretly keeping instruments for the counterfeiting of gold dust, feloniously, etc.

EVIDENCE—PRESUMPTIONS.—The knowingly and secretly keeping instruments adapted and intended for the unlawful business of counterfeiting, is made proof of the guilty aim to use them for the evil purpose for which they were evidently designed. It is a presumption that the prisoner is called upon to rebut.

APPEAL from the third judicial district, Ada county. That part of the indictment in which the alleged defect occurs reads as follows: “The said John C. Page on the fifteenth day of November, 1866, at the county of Ada, did knowingly and willfully have in his possession and secretly did keep one furnace, three bottles acid, one mortar and pestle, two sieves, one pair tongs, one gold pan, one large file, one frying-pan, one lot buckshot, one sack of spelter, one sack of sand, two crucibles, six iron bars, the same then and there being instruments for the purpose of counterfeiting uncoined gold, gold lumps and pieces commonly called gold dust, then and there currently passing in the territory of Idaho, contrary,” etc.

Trial, and verdict of guilty. Motion in arrest of judgment, upon the ground that the indictment did not contain facts constituting a public offense; also motion for a new trial, both of which were denied.

Curtis & George, and Huggan & Ganahl, for the appellant.

Heed & Miller, for the people.

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McBRIDE, C. J., delivered the opinion of the court, KELLY, J., and CUMMINS, J., concurring.

The defendant, John C. Page, was indicted with others, in the district court of the third judicial district, by the grand jury of Ada county, territory of Idaho, for the offense of having in his possession and secretly keeping instruments for the manufacture of what is termed, in the common phrase of the country, "bogus dust." The defendant had a separate trial and was convicted. After the verdict of the jury was rendered, a motion was made by counsel for the prisoner in arrest of judgment, assigning for cause that the indictment was defective, and did not charge the defendant with any offense known to the law. This motion was overruled by the court and exception taken. The defendant then moved for a new trial, and assigned for causes several: 1. Misconduct on the part of the jury; 2. Refusal of the judge to give certain instructions to the jury, which refusal was excepted to; 3. Admission of improper testimony by the judge in the trial below; and, 4. Insufficiency of the evidence to justify the verdict.

The motion for a new trial was overruled by the court, and exceptions taken. From these rulings of the court the defendant appeals to this court. The appellant's counsel, in the argument of this cause, alluded to the fact that the record disclosed many exceptions to the ruling of the court below in the admission of testimony, etc., and intimated an opinion that the court would examine and determine upon the merits of these exceptions. We desire in this connection to say that, although an appellant may except to any erroneous ruling of the court below, he must, in his assignment of errors in this court, specify and point out those upon which he relies. The appellant must not say generally that there are errors in the record to which he has taken exceptions, and then call upon the court to go through that record and hunt them up; but he must, in his assignment of errors, point out specially such as he wishes to have reviewed; otherwise we shall treat all such as waived. In considering this case, therefore, we will only pass upon

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such questions and alleged errors occurring in the court below as our attention has been directed to in the argument assigning such errors.

The first error assigned is that the facts stated in the indictment do not constitute a public offense. If this be true, the defendant might have demurred to the indictment before the trial, and had the right to move in arrest of judgment after the verdict. The statute under which the indictment was found makes it a public offense, a felony, for any person to knowingly have and secretly keep instruments for counterfeiting gold dust with the purpose of using them. To constitute the offense there should exist the following facts: The defendant should have the instruments in his possession; they should be secretly kept; they should be instruments adapted and designed for the commission of the offense; and they should be kept for the purpose of committing that offense. Does the indictment in this case charge the defendant with these facts? We will briefly analyze it. It charges him with having the instruments in his possession; it charges him with keeping them secretly; it charges that they are instruments adapted to the unlawful purpose of counterfeiting gold dust; and here the indictment stops. It does not charge the defendant with having the counterfeiting instruments in possession, secretly, for the purpose of using them. If it be said that the words, "then and there being instruments for the purpose of counterfeiting uncoined gold," were meant to charge the guilty purpose on the defendant, then it leaves the indictment equally defective; because there would be no allegation of the design and adaptability of the instruments to the unlawful purpose. As the indictment now stands, the defendant might admit every allegation of fact contained in it, and yet be perfectly innocent of any offense known to the law. He could admit that he had the instruments and materials charged knowingly in his possession; that they were secretly kept, and that they were adapted and designed for counterfeiting; and yet, unless the defendant intended to use them for that unlawful purpose, he would be innocent of crime. If, on the other hand, we adopted the construction of this indict-

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ment contended for by the counsel for the people, the defendant would be charged with having the enumerated instruments in his possession, with keeping them secretly, and for the purpose of using them; but it would not show that they had any adaptation to the design, or that he could effect the unlawful purpose by the use of them, and the law will not punish one who is not shown to have the means of committing the offense. We find ourselves, therefore, driven to the conclusion that the indictment is radically defective, and the court below erred in overruling the motion for arrest of judgment.

There is another gross error on the face of the indictment, which we allude to simply to prevent its repetition. The indictment charges that the defendant is guilty of a "felony," instead of naming the real offense—that of having and secretly keeping instruments for the counterfeiting of gold dust, feloniously, etc. No exception to this was taken before the trial, or after; and perhaps after verdict it would not avail the defendant; but the error is one that is too palpable and unnecessary to be passed over without animadversion. Indictments for offenses should be carefully and considerately drawn, and it is idle to attempt to punish crime unless public prosecutors faithfully do their duty. Judges are not prosecuting officers, and ought not to be expected to assume the functions of such. A judge should see that a fair and impartial hearing is given the people and the prisoner, and it is entirely inconsistent with his position that he should be the monitor of the prosecuting officer, or identify himself in the least degree with the conduct of the trial on either side of a criminal cause.

It appears from the instructions given the jury in the court below, that the necessity of finding the guilty purpose with which the instruments were kept, were clearly indicated to the jury, and it is somewhat strange that the defect was unnoticed by the prosecutor, and even the defendant's counsel, until after the trial. In future we hope to be compelled to comment upon such carelessness no more. There was also a motion made in the lower court for a new trial upon several grounds assigned. This was overruled, and

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the exception is before us on this hearing. A decision on these questions is not necessary of course to a determination of this case; but we allude to some of the points raised, for reasons of general interest to the profession.

It is alleged there was misconduct of the jury because a file, which had been used in evidence on the trial alluded to by counsel on the argument, and examined by the jury, was conveyed to the jury-room by the officer who had them in charge while they were deliberating. It is difficult to see, in the absence of any proof, that the presence of the file in the jury-room was prejudicial to the defendant any more than to the cause of the people. It was admitted to be the same instrument—no change is alleged to have occurred in its condition or appearance from the time it was exhibited to the jury in evidence and the time when it was conveyed to them by the officer, and unless the court could be satisfied that it had some prejudicial influence, the irregularity would be disregarded. That the officer who conveyed the file to them without authority was culpable is clear. He is sworn by the requirements of the statute to “not communicate with the jury himself, nor to allow any one else to do so, except to ask them if they have agreed, without authority of the court.” Any departure from the duty thus solemnly imposed upon an officer having a jury in charge, is highly reprehensible, and while the misconduct of such officer might not necessarily vitiate the result of the deliberation of a jury in his charge, his fault is none the less.

Another point of some interest and importance urged as ground for new trial in this case, is that there was no proof of the guilty purpose of the defendant to use the instruments in counterfeiting, as charged. The well-established rule in the enforcement of the statutes against counterfeiting in all the states, is that the knowingly and secretly keeping instruments adapted and intended for the unlawful business is made proof of the guilty aim to use them for the evil purpose for which they were evidently designed. It is a presumption that the prisoner is called upon to rebut. He must show that while they are a badge of guilt, he was using them, or intending to use them, for a lawful and innocent

Points decided.

purpose. Experience has shown this rule not to be a harsh one in cases of this character. If one is engaged in manufacturing jewelry, or experimenting in metals or ores, the innocence of his occupation will be manifest by many little incidents that would protect him before an intelligent jury. On the contrary, if he be guilty, he will be likely to shrink from any exhibition of his labors, and trust to the doubts of the tribunal before which he is heard. We think that the rule laid down by the prisoner's counsel is too broad, and does not apply to this class of cases, and that the one we have indicated above, and which was not harshly applied by the court below in this case, is the true one.

On the other point made as to the admission of the letter of Murphy, an accomplice of the prisoner, we do not see any error. It was admitted on the express ground that the jury were to be satisfied from the evidence *aliunde*, that the prisoner was an accomplice of the writer, and unless they so found, it could not of course apply to or prejudice him. Whether the confederation between Murphy and the prisoner and others was established or not, was a question for the jury: if they believed it was, then the letter was proper testimony for them to consider; if not, then it could have no weight. We do not see that the verdict indicates that the jury were mistaken as to there being a confederation, and if so then their finding on the guilt of the prisoner can not well be attacked.

The judgment in this case is that the judgment of the court below be reversed, that the motion for arrest of judgment be sustained, and the indictment be dismissed, and the prisoner remanded to await the action of the grand jury of the proper county.

EDWARD LOWE, RESPONDENT, v. R. TURNER ET
AL., APPELLANTS.

TENANTS IN COMMON—JOINT LIABILITY—JUDGMENT.—Action against T. and S. for the foreclosure of mechanic's lien. The work was performed between the second of August, 1863, and the thirtieth of November, 1865. The defendants were tenants in common of the incumbered prem

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ises at the time of commencing this suit: *Held*, 1. That if the defendants were liable at all to the plaintiff, L., they were jointly, and not jointly and severally, liable; and, 2. That a separate, personal money judgment could not be entered against one of the defendants, by default.

JUDGMENT—JOINT DEBTORS.—A judgment can not be rendered against the property generally and against one of the owners thereof in a right of action clearly against all jointly.

PRACTICE—JUDGMENT.—It is error to enter judgment against one of the defendants, after having sustained a demurrer to the complaint upon the ground that such pleading “does not state facts sufficient to constitute a cause of action,” without first amending the same.

IDEM.—In cases of trial, the plaintiff should recover such judgment as he shows himself entitled to under the pleadings and proof.

IDEM.—When judgment is rendered upon the default of a defendant, the recovery must follow the prayer of the complaint.

PRESUMPTIONS—COURTS OF RECORD.—All presumptions and intendments are in favor of the regularity of the proceedings of courts of record.

APPEAL from the second judicial district, Boise county.

Action for the foreclosure of a mechanic's lien, praying for a decree of sale of the premises to satisfy the demand, the incumbered premises being the “Warm Springs,” situate near Idaho City in Boise county. Sims, one of the defendants, appeared and demurred to the complaint under the sixth subdivision of section 40 of the practice act. This demurrer the court sustained. Afterwards judgment by default was allowed against Robert Turner, who did not appear in the action in the court below. This judgment was for the sum of seven hundred and sixty-nine dollars and twenty-five cents, and costs of suit; but there was nothing said about the mechanic's lien.

Gilbert & Henley, for the appellants, cited *Reynolds v. Harris*, 9 Cal. 338; *Lamping v. Hyatt*, 27 Id. 300; *Van Dorn v. Tjader et al.*, 1 Nev. 380; *Gage v. Rogers*, 20 Cal. 91; *Lattimer v. Ryan*, Id. 628; *Burling v. Goodman*, 1 Nev. 314.

C. Sims, for the respondent.

CUMMINS, J., delivered the opinion of the court, McBRIDE, C. J., concurring.

This suit was commenced for the foreclosure of a me-

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chanic's lien on certain property described in the complaint as the "Warm Springs property," including one hundred and sixty acres of land, with several buildings thereon. One of the defendants, Sims, appeared in the court below and demurred to the complaint on the ground that "it did not contain facts sufficient to constitute a cause of action." This demurrer the court very properly sustained. There was, however, no judgment rendered in favor of Sims for his costs, or dismissing him from the action. Neither was there any amended complaint ever filed. After disposing of this demurrer, the plaintiff took a several personal judgment by default against Robert Turner for the whole amount claimed. It seems to be admitted that the court below held the mechanic's lien, attempted to be secured by the plaintiff, entirely insufficient in law to create a lien upon the property described in the complaint, although the record contains nothing of this, unless it is by inference from the fact of entering a personal judgment against one of the defendants. The errors complained of by the appellants are contained in the record, and the first to which our attention is directed, which is the most material, is this: Had the court power to enter a personal separate judgment against one of the defendants?

The complaint does not allege that the work and labor was performed under a contract with the defendants, or either of them, but simply for the owners of the property, without showing who they were. The work was performed between August 2, 1863, and November 30, 1865. It is further averred that at the commencement of this action, in January, 1866, the defendants were owners of the property as tenants in common, authorizing the inference that they were not the owners when the work was being carried on. The only conclusion which we can arrive at from this state of facts is that these defendants were sued, not because they were the parties at whose instance the work was done, for we have seen that this conclusion is unwarranted by the pleadings, but because they were the owners of the property sought to be charged with the lien at the time the suit was commenced. If we are correct in this conclusion,

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and certainly no other is legitimately deducible from the record before us, the defendants were jointly liable, if liable at all. They were holden for the demand only so far as they were the owners of the property asked to be sold. Their interest in that, it is alleged, was that of tenants in common, Turner owning two thirds and Sims the remaining one third. Unless their liability was joint and • several, the plaintiff would have had the undoubted right to have sued but one of the parties made defendants in this action, if he had so desired, who was only a part owner in the premises, recover a judgment and decree of sale of the entire property to satisfy his claim, although this should include the interest of the other co-tenant who was not joined in the action, a proposition which can not be seriously contended for by any one. As before remarked, then, the very foundation of their liability rests upon their ownership in the property, which was joint, and not upon any personal liability to the plaintiff. It is nowhere alleged that they or either of them procured the labor, or that it was done at their instance. Neither is it alleged that these defendants were the owners of the property during the time the services were being rendered, but simply that they were the owners as co-tenants at the time the complaint was filed. If, then, they were joined in this action simply because they were the owners of the property sought to be incumbered with the laborer's lien, it follows that the judgment must be against both the defendants, or neither of them. A judgment could not be against the property generally and against but one of the owners thereof in a right of action clearly against all jointly.

It is conceded, however, that the court below entered a personal money judgment only against Turner, and did not order a decree of sale of the property. But this does not change the legal liability of the parties in the premises. If a money judgment only could be entered against Turner, the very same right existed against the other defendant, Sims. There is not a single fact contained in the record even tending to show that the plaintiff had a better or a separate right of action against Turner. In fact, the record

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discloses no personal liability on the part of either of the defendants. It seems to be more in the nature of an action *in rem* than one involving any personal responsibility.

The next error complained of is that the court below could not legally enter judgment against one of the defendants after having sustained a general demurrer to the complaint upon the ground that such pleading "did not state facts sufficient to constitute a cause of action." Sims interposed this demurrer, which was very properly sustained. By the judgement on this demurrer, the court determined that there were not facts enough stated, taking all those well pleaded to be true, to entitle the plaintiff to recover against the defendant so demurring. And yet, as before observed, there is not a single averment in the complaint that does not equally apply to both defendants. But besides this, it presents the anomaly of the court declaring a pleading totally insufficient in its statement of facts to support or authorize a judgment against one defendant but that the same allegations are sufficient as to another. This might be true if there were facts stated in relation to one that did not apply to the other, but such is not the case under discussion. By the decision on the demurrer it was adjudged by the court that the complaint did not contain a cause of action, although all the facts properly pleaded were conceded to be true and still judgment was rendered on such pleading without any amendments having been made thereto. This we must hold to have been error.

Another error assigned by the appellant is that the judgment by default does not follow the relief asked. In this action the defendants were notified that unless they appeared and answered, default would be entered against them, and that application would be made to the court for the relief demanded. This relief was, as before suggested, for the foreclosure of a mechanic's lien and a decree of sale of the incumbered premises to satisfy plaintiff's demand. This the defaulting defendant may have been willing to allow, more particularly when we recollect that there is nothing contained in the complaint tending to show that there is no personal liability on the part of the defendants. Hence, in

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taking a personal or money judgment only, the plaintiff did not take the relief he notified the defendant he would ask of the court. In cases of trial the plaintiff should receive such judgment as he shows himself entitled to under the pleadings and proofs. But when judgment is entered upon the default of the defendant, the recovery must follow the prayer of the complaint. In the case of *Burling v. Goodman et al.*, found in 1 Nevada, the supreme court say that "when judgment is taken by default, the plaintiff is confined to a recovery of the particular amount or thing demanded in the prayer of the complaint. If the prayer be for judgment of one thousand dollars, the plaintiff can not legally take judgment for a greater amount. Or if he pray for the possession of specific personal property, he can not have judgment for the return of property of a different kind. The reason and fairness of the rule are obvious. The defendant by his default admits the justice of the claim, and thus consents that judgment be taken against him for what is prayed for in the first instance; whereas, if a greater sum or a different relief were demanded, he may appear and contest the claim as unjust and unreasonable." (See *Lamping & Co. v. Hyatt et al.*, 27 Cal. 99.)

The last error assigned which we will notice is, Had the court jurisdiction of the person of the defendant Turner? It is contended by appellant that the court had not; that there is no evidence of service of process upon him. There is a memorandum on the complaint of acceptance of the same and a waiver of copy of summons, which is signed by "Robert Turner." In the record of this case, kept in the court below, is found, among others, this entry: "The summons in this action having been duly served upon the defendant Robert Turner," etc., which is signed by the judge presiding. While it is true there is no rule or theory by which the court is presumed to know the signature of a party defendant, who has not appeared in the cause, yet under the well-established principle that all presumptions or intendments are in favor of the regularity of the proceedings of courts of record, we see no error in this. It is presumed that the court below took evidence or was made

Argument for Appellants.

satisfied by some legal mode of the genuineness of the signature of the defendant accepting service.

There being therefore only a joint liability on the part of the defendants to the plaintiff, if any at all, a several judgment could not legally be entered against either of said defendants.

Judgment reversed.

ORO FINO AND MORNING STAR MINING COMPANY, RESPONDENTS, v. PATRICK J. CULLEN ET AL., APPELLANTS.

PRACTICE.—For the sake of harmonizing the practice in legal and equitable cases, and to give effect to the spirit of our code, we incline to the opinion that the practice is, to proceed against a decree in order to annul or set it aside in the same manner as against a judgment entered in a court of law.

IDEM—DISSOLVING INJUNCTION.—A party denying the allegations of a bill in equity, and desiring to procure the dissolution of an injunction on the ground of having denied the equities of such bill, must controvert directly every material allegation of such bill; he must not undertake to set up new facts; must not confess and avoid. It must simply be a plain, direct, unequivocal denial.

IDEM.—When the whole equity of the complaint is denied by the answer, the defendant is entitled to a dissolution of the injunction *pendente lite* until the plaintiff's title is established by proper evidence on the hearing of the cause. But to have this effect the denial of such equities must be full and specific, and must cover the whole ground.

IDEM.—If facts are admitted which qualify a general denial; if the denials be evasively made; or if, on examination of the circumstances, the court deem that the facts warrant the continuance of the injunction notwithstanding a formal denial may have been made, the rule will not be applied.

PARTIES—AMENDING BY ADDING PARTIES.—The district court has the right at any time to call in other parties, or to cause the proceedings to be amended in that particular by striking out or adding the names of any parties, which may be necessary to accomplish the ends of justice and secure the interests of all.

APPEAL from the third judicial district, Owyhee county.

Ed. Nugent, for the appellants:

1. The rule that questions must be disposed of in the order in which they arise applies in this instance to proceed-

Argument for Respondents.

ings *in limine*. The proposition that a judge can not trespass upon the province of a court and pass upon a demurrer is not disputed by the appellants, but it is contended that no result can prevent a collateral proceeding being governed by the rules to which it owes its origin. As in the former equity practice, so under the statute a demurrer is a thing unknown, and can not be regarded upon an application for a dissolution of an injunction. If granted before answer filed, the defendant, when moving to dissolve, can proceed upon bill, answer, and affidavits, or upon either of them, and is precluded from introducing anything in the nature of a dilatory plea. The demurrer is not only excluded, but is useless, since, whether demurred to or not, the bill must show sufficient grounds for relief, and this notwithstanding the fact that an answer has been filed. It is urged by appellants that the injunction should have been dissolved for the following reasons: 1. An answer was on file at the time, in which was denied specifically all the material allegations of the bill; 2. The bill itself made no sufficient showing for an injunction; 3. The proceedings enjoined was the execution of a decree obtained in the same suit.

Martin & Johnson, for the respondents:

1. No motion to dissolve an injunction can be sustained upon a demurrer, which admits all the facts, unless there is an utter want of a cause of action set out.

2. If there should be some defect in the complaint, but if the court can see that a good cause of action did exist, and that it was a proper one for injunction, the court would sustain the injunction and permit amendments.

3. The motion being made on the demurrer, it is the only paper which can, under our practice, be considered, because one party can not be permitted to say at the same moment the complaint is true and is not true, and assign to the court two utterly repugnant reasons for its action. The law requires issues of law to be first determined. The course appellants propose produces a singular phenomenon at law; they would have the benefit of the demurrer and we not.

4. The answer, if considered, is insufficient and inconsistent.

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ent. The liens and the judgment upon them were illegal and fraudulently taken, for the purpose of charging one portion of joint property and by the sale of that portion relieve the other co-debtors.

5. The enforcement of the lien against the complainants would be a violation of an equitable rule that where two persons have each a security upon a single fund, and one of them has security upon another fund, he will be restrained from enforcing his security out of the fund which the two securities are on to the prejudice of the other creditor. (Authorities referred to by respondents' counsel as to the effect of a demurrer: 1 Van Sant. Pl. 649, 651, 668; Van Sant. Prec., note, 371; Abb. Prec., note, 41; Practice Act of Idaho territory, sec. 156; Story Equity Pl. 452; 3 Cal. 323; 8 Id. 397; Barbour on Parties, 62; *Cutler v. Wright*, 22 N. Y. 482. As to pleadings and answer: Van Sant. Pl. 418; *Hensley v. Parton*, 14 Cal. 509; *Blackman v. Vallejo*, 15 Id. 644; *Curtis v. Richards*, 9 Id. 38; *Burke v. Table Mountain Co.*, 12 Id. 407; *Baker v. Baker*, 13 Id. 98; *Verzan v. McGregor*, 23 Id. 339; *Nelson v. Murray*, Id. 338; *Brown v. Scott*, 25 Id. 196; *People v. Supervisors San Francisco*, 27 Id. 674; *Landers v. Bolton*, 26 Id. 416.)

MCBRIDE, C. J., delivered the opinion of the court, CUMMINS, J., concurring.

The facts in this case, as shown by the pleadings, are as follows: More & Fogus, the grantors of the plaintiff in this suit, were the owners of an undivided five hundred and sixty-two and one half feet of one thousand feet in the Oro Fino quartz lode in Owyhee county, Idaho territory, and as such were in the control and management of the mine. The defendants in this suit, claiming to be workmen and contractors under the mechanic's lien law, had filed their liens, amounting to over twenty-two thousand dollars, upon the improvements and works of More & Fogus in and upon said mine. On the eighth day of October, 1866, and after a suit for foreclosure of these liens had been commenced by the defendants in the present suit, More & Fogus, having failed in business, made a transfer of their interest in this mine, together with

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other property, to the plaintiff in this action. It appears that the plaintiff in this suit, without asking to be made defendant in the suit upon the mechanics' liens, had employed counsel to defend that action under some arrangement with More & Fogus to that effect, but upon the day set for hearing, the counsel thus engaged were dismissed by More & Fogus, who were then only nominal defendants, and withdrawing the defense which had been interposed by this plaintiff, the parties took judgment for the enforcement of their liens, and a decree ordering the sale of the improvements in the Oro Fino mine was duly entered. Shortly after the defendants took out an execution for the sale, and the sheriff was proceeding thereunder, when the plaintiff brought the present action to restrain the sale, to have the liens set aside and annulled, and that the defendants be enjoined from the benefits of said decree of foreclosure and sale.

As the ground of this relief the plaintiff claims that it is the owner of all the right and title of the said More & Fogus, to wit, the owner of five hundred and sixty-two and one half feet of one thousand feet of the Oro Fino mine by deed of transfer of October 8, 1866; that by an agreement with its grantors, the suit being at the time pending, the plaintiff was to employ counsel to attend to the trial of the rights of the parties, and that the plaintiff did so employ counsel; that on the day fixed for the hearing the said More & Fogus came into court, dismissed the counsel so employed by plaintiff, substituted other counsel by whom no defense was made, and judgment was taken upon confession against said More & Fogus, and a decree entered thereon ordering the enforcement of the liens.

The plaintiff alleges that this decree was obtained in fraud of its rights by collusion between More & Fogus, who were at the time of its rendition only nominal defendants, and the defendants in this action, and for the purpose of incumbering and charging the payments of these claims upon property not subject to any such liens. The plaintiff alleges that the work which was the basis of the liens was done as common laborers, and not as contractors; that it

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was done upon the whole mine of one thousand feet, and not the interest of said More & Fogus; and the said liens, upon which the said decree of foreclosure was based, were utterly invalid and insufficient. These are the substantial facts upon which the plaintiff seeks relief, and on this showing an injunction was issued by the district judge. To this complaint a demurrer and answer were filed, and afterwards an application was made to the district judge to dissolve the injunction upon the ground that the answer denied all the equities of the bill. The judge below refused the motion on the ground: 1. That the demurrer being an admission of the truth of the complaint, the defendants could not be allowed to use their answer to controvert its allegations; and, 2. That the facts stated in the complaint being admitted, showed a *prima facie* right to the relief prayed for.

As the reasons for that decision are purely technical and involve only a question of practice, in the absence of a full bench we pass them by, and propose to dispose of this motion on its merits. Before considering the main question, however, it will be proper to notice that part of the argument of the defendants which insisted that as the original suit was a proceeding in equity, no injunction would lie to restrain the execution of the decree of foreclosure and sale, and a somewhat broad challenge was made for the production of any case where a court of equity had enjoined proceedings under a decree entered in its own forum. This notion is in one sense correct. We find no instance where a court of chancery has restrained its proceedings, and for the simple reason that under the old equity system everything was directly under the control of the chancellor, and he enforced his decrees by the processes of orders and attachments. Counsel would hardly contend that a decree, once entered in a court of equity, must be executed and was irrevocable, although it bound and concluded the rights of parties who were shown to be strangers to the proceedings. The remedy in the old practice was to move to open and set aside the decree. (See Story Equity Pl., p. 472, sec. 426.) Or, if it was pending the action, to move for a stay

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of proceedings. A motion for an injunction was not necessary, because the proceedings would be stayed by an order from the chancellor. But as the statute provides under the code that decrees shall be enforced by the writ of execution the same as a judgment at law, it can, for the purpose of remedial proceedings, be treated in the same manner as a judgment rendered by a court of law. Or if, in closer analogy to the ancient practice, we adopt the rule of opening the decree and staying proceedings by an order issued on a showing, we reach the same results. For the sake of harmonizing the practice in legal and equitable cases, and to give effect to the spirit of our code, we incline to the opinion that the better practice is to proceed against a decree in order to annul or set it aside in the same manner as against a judgment rendered in a court of law. It will be seen that the doctrine here laid down does not conflict with the decision of Justice Harris referred to by counsel. (3 N. Y. Code Rep. 86.) That was a case where an injunction was prayed for pending the suit, not after decree. The court held that the motion to stay proceedings was the proper remedy. And the reason assigned was that the injunction could not be necessary, because, under the code, the defendant had a right to interpose his equitable defense to an action at law.

We conclude, therefore, that under the code, when decrees in equity and judgments at law are enforced by the same process, viz., that of execution, the same remedies apply in cases when it is sought to annul and set them aside. The other objection, that the bill itself is an insufficient showing for an injunction, we pass by, because such questions are properly raised on demurrer only, and not before us. How far a judge should go in determining the legal sufficiency of a bill before an injunction, we will not undertake to define. A *prima facie* showing certainly should be made, but what this is we will not now stop to inquire. To go into the case as suggested in the argument would require the same scrutiny that it would to pass upon the demurrer, and that we think clearly beyond the province of the judge in such a case. The defendants insist that

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their answer denies all the equities stated in the bill, and upon the settled rule in such cases the injunction should be dissolved.

This rule, however, being founded upon the old idea that when two parties in a suit affirmed with equal positiveness that an opposite state of facts existed, the chancellor must offset the one against the other, has always been acted upon with strictness. The party denying must controvert directly every material allegation of the bill. He must not undertake to set up new facts—must not confess and avoid. It must simply be a plain, direct, unequivocal denial. The rule is well stated in Whittaker's Practice, vol. 1, p. 479: "When the whole equity of the complaint is denied by the answer, the defendant is entitled to a dissolution of the injunction, *pendente lite*, until the plaintiff's title is established by proper evidence on the hearing of the case. But to have this effect the denial of such equities must be full and specific, and must cover the whole ground. If facts are admitted which qualify a general denial; if the denial be evasively made; or if, on examination of the circumstances, the court deem that the facts warrant the continuance of the injunction, notwithstanding a formal denial may have been made, the rule will not be applied." (See Whittaker, *supra*, and other authorities there cited.)

We will not take the time to go into the answer in this case and show that it is insufficient to support the motion. It may suffice to say that its denials are in some of the most material matters merely formal and technical; that it is in some material portions evasive and special, and is a better specimen of ingenious denial than ingenuous pleading. The defendants deny that the plaintiff has any interest in the property on which their liens are foreclosed, and yet admit that the parties against whom they foreclosed those liens had given plaintiff a deed prior to the decree of sale. They deny that the plaintiff, with the consent of More & Fogus, ever employed counsel to defend the suit upon which decree was entered, and yet admit that attorneys were employed and did appear, and were dismissed by More & Fogus, and other attorneys substituted. They deny

Points decided.

that the work and labor upon which their mechanics' liens were based were performed on the whole of the one thousand feet belonging to the mine, and admit that More & Fogus owned only five hundred and sixty-two and a half feet undivided of the mine, which renders the denial a solecism, because it is a physical impossibility to work on the interest of More & Fogus alone. They deny that they were "not contractors," as alleged in the complaint, but do not state in affirmative form—which would have been the proper way—what their "contract" was. We repeat, such denials as those referred to above can not be treated as "full, direct, and specific." They are, in the language of the authority quoted, "evasively made," and do not entitle the party to the favorable action which he seeks.

There was some reference made to the question of the proper parties, but that is more properly a matter to be addressed to the court below in the progress of the cause. The court has the right at any time to call in other parties or to cause the proceedings to be amended in that particular by striking out or adding the names of any parties which may be necessary to accomplish the ends of justice and secure the interests of all.

The judgment will be that the order of the judge below denying the motion to dissolve the injunction be affirmed, and that the case be remanded with an order to proceed with the cause.

Order affirmed.

B. F. LAMKIN, RESPONDENT, v. E. C. STERLING, APPELLANT.

EXCEPTIONS—PRACTICE.—It is undoubtedly the general rule that when a party seeks to reverse a judgment rendered in the inferior court, he must except to the ruling of the court and assign the error in this court on appeal.

IDEM.—The exceptions to the rule that exceptions must be first taken in the court below are where a complaint is so radically defective that it discloses no cause of action and will not support a judgment; and where a judgment has been taken by default and the appellant could not except by reason of his non-appearance, and who was bound to see that the proceedings were regular and legal.

Argument for Respondent.

IDEM.—When there is sufficient in a complaint to support a judgment, notwithstanding it may be defectively stated and open to demurrer in the first instance, still if the judgment thus rendered be not excepted to, the appellant has lost his rights, and can not reverse the judgment, however patent the error.

IDEM.—There is no rule of practice governing legal proceedings more clearly defined, nor better settled, than that any objections of whatever character, whether with reference to the regularity of the proceedings on the trial of the cause, or to error of law committed by the judge in relation to a motion, or of any ruling whatever on a question of law arising during the proceedings, must be taken at once, at the time when the question arises.

IDEM.—The code has denominated the hearing and disposing of questions or issues of law, trials. When, therefore, a cause is called to dispose of any issue, whether of law or fact, it is, in contemplation of section 191, called for trial, so far at least as to require all rulings of the court which it is desired to have reviewed in an appellate court incorporated into a bill of exceptions.

APPEAL from the third judicial district, Ada county. The alternative mandate was issued, commanding the territorial treasurer, E. C. Sterling, to pay a certain warrant described in the writ, or that such treasurer show cause to the contrary on the first day of December, 1866, before the district judge at his chambers. On the return day, a motion was filed to quash the writ on the ground that "the affidavit upon which said writ was granted does not state facts sufficient to entitle the plaintiff to said writ, or to constitute a cause of action." This motion was denied, to which ruling no exception was taken. There was no other or further defense interposed. The peremptory writ was afterwards ordered to issue.

S. P. Scaniker, for the appellant.

Miller & Prickett, for the respondent:

No exception was taken by the appellant to any ruling or decision of the judge below. Objections must be taken on the trial below; they can not be taken for the first time in the appellate court. If exceptions to the rulings below be not taken at the time, they can not be urged on appeal. There is no assignment of errors on file in this case. By assignment of errors, as the term is used in this court, is meant a specification of the errors upon which the appel-

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lant will rely with such fullness as to give aid to the court in the examination of the transcript. (*Squires v. Foorman*, 10 Cal. 298.) No exception having been taken, and there being no assignment of errors on file, this court can only look to the judgment roll and review errors apparent upon its face. (*Nelson v. Mitchell*, 10 Cal. 92; *McGill v. Rinaldi*, 11 Id. 391; *Doyle v. Seawell*, 12 Id. 425; *Russell v. Ford*, 2 Id. 86; *Mott v. Smith*, 16 Id. 533; *White v. Pratt*, 13 Id. 521.) The complaint in this case shows a good cause of action, and there being no error apparent upon the face of the judgment roll, the judgment of the judge below should be affirmed. (*Karth v. Orth*, 10 Cal. 192; *People v. Goldberg*, Id. 312; *People v. Cornell*, 11 Id. 70.)

MCBRIDE, C. J., delivered the opinion of the court, CUMMINS, J., concurring.

This was an action of mandamus to compel defendant, Sterling, territorial treasurer, to pay territorial warrant No. 212, for one hundred and sixty-six dollars and sixty-six cents, to the defendant, who was the owner and holder. The facts alleged are that the territory was indebted to the defendant as territorial auditor; that he settled and audited said account, drew his warrant for the sum due, and that it was presented in its order for payment; that the funds applicable to the payment of the same were in the hands of defendant, and that he refused to pay the warrant; whereupon the plaintiff filed his complaint with the judge of the third judicial district, setting forth the facts and praying that a writ of mandate issue to compel the defendant to pay said warrant or show cause for his refusal. The defendant appeared by counsel before the judge at chambers and filed his motion to quash the writ, on the ground that the facts stated in the complaint were not sufficient to entitle the plaintiff to the writ, and constituted no cause of action. The record discloses a demurrer, but as no action appears to have been had upon it, and as the motion to quash is the proper mode of reaching the point made by the demurrer, we suppose that the party waived it on the hearing.

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The motion to quash was denied on the hearing, and no further answer or defense being made, the writ was made peremptory. No exception was taken to the ruling on the motion, and the plaintiff having given notice of appeal, the case is before us for review. There is no assignment of errors on file, and the appellant seeks for reversal of the judgment on the ground that there are errors in the record.

The plaintiff, when this case was called, moved to dismiss the appeal on the ground that there is no assignment of errors, and that as no exception had been taken in the court below, there was nothing before this court for review.

As the practice of the court had never been fully announced on the points involved in the motion, we declined to pass upon it on the brief argument submitted, and directed the counsel to proceed with the argument on the merits, reserving the consideration of the motion for a more deliberate examination.

It is undoubtedly the general rule that when a party seeks to reverse a judgment rendered in the inferior court he must except to the ruling of the court and assign the error in this court on appeal. If a party can submit to rulings in the lower court, taking no exceptions, and afterwards go back into the record and hunt up errors and bring them into this court and avail himself of them without assignment, then there are few cases that might not be reversed. The reason for the rule is that every presumption of law is in favor of the judgment below, and that if a party does not except to a wrong ruling at the time it was made, he is deemed to have acquiesced in the decision and waived his objection. Another reason is that it should appear that the precise point adjudged below had received the attention of the court and have been passed upon adversely to the rights of the appellant.

But it is claimed that an appellant may assign errors apparent on the judgment roll without having taken his exception. We have examined the authorities in California, and they are numerous, and while there is some little conflict in the practice, the later rule, and far the better one, in our opinion, is that the court will only examine the errors ex-

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cepted to and assigned. The better authorities go even so far as to say that the appellant must not only except to the ruling in the lower court, but he must specifically assign the error, or the exception will be disregarded. In practice many exceptions are noted which the party himself, on reflection, does not deem reliable, and hence he is called upon specifically to assign such as he wishes to stand upon in the appellate court.

The exceptions to the rule are that where a complaint is so radically defective that it discloses no cause of action and will not support a judgment, and where a judgment has been taken by default and the appellant could not except by reason of his non-appearance, and where the plaintiff was bound to see that the proceedings were regular and legal, then in such case the appellant may assign the error though he have taken no exception. As this judgment was not on default we need not consider that branch of the exception, and turn to the other branch to see if the case at bar comes within it.

The complaint sets up that the territory was indebted to him for services in an official capacity; that a warrant was drawn evidencing the indebtedness; that it was presented to the proper officer for payment; that he had funds applicable to its discharge, and refused to pay. Upon the face of this complaint a cause of action was shown: If the warrant was improperly drawn, if the man who drew it had no authority to do so, or if it was for a larger amount than he was entitled to, or it was deficient in any of the particulars claimed on the argument, it should have been set up either by way of special demurrer or by answer stating the defects. For illustration: A suit is brought by A. against B. to recover the amount of a promissory note, and it should appear upon the face of the complaint that the right to recover was barred by the statute of limitations. B. denies the indebtedness, and on the trial the issue is found for A. and a judgment rendered. He appeals from the judgment, and assigns for error that it appears from the face of the complaint that the action was barred by the statutes of limitation. Here, although the appellant would show an

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error which if he had urged in the court below and had taken his exceptions, his right to recover the judgment would be clear; yet, having failed to avail himself of the objection there, he could not raise it in the court above. The rule is that where there is sufficient in a complaint to support a judgment, notwithstanding it may be defectively stated and be open to demurrer in the first instance, still if the judgment thus rendered be not excepted to, the appellant has lost his rights, and can not reverse the judgment, however patent the error. The rule is well stated in 16 Cal. 533, by Judge Field, and is affirmed in many others, both prior and subsequent to that case.

The order in this case will be that the appeal be dismissed and the judgment below affirmed, with costs.

CUMMINS, J., delivered the opinion of the court on the petition for a rehearing, McBRIDE, C. J., concurring.

Appellants file their petition for a rehearing of this cause, assigning several reasons therefor, the most material among which are: The only object of an exception is to bring up the record, and that in this case there was no reason for an exception; and, further, that exceptions are unauthorized by law in a case where judgment is rendered without a trial. There are several other grounds contained in the petition, but it is unnecessary to pass upon them in detail.

It was contended by appellant's counsel upon the argument that a motion made and an order of the court entered upon such motion, but which was not made during the progress of the trial of the cause, either before a jury or by the court, were parts of the record, and for that reason the ruling or decision of the court need not be excepted to or included in a bill of exceptions; that the transcript in such a case would be sufficient to call upon this court to review the action of the inferior court, even though no exceptions to the rulings of such court were taken unless they occurred during the trial of issues of fact.

While it may be true that motions and orders of judgments of the court thereon become parts of the judgment roll, yet it does not necessarily follow that this is always

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other property, to the plaintiff in this action. It appears that the plaintiff in this suit, without asking to be made defendant in the suit upon the mechanics' liens, had employed counsel to defend that action under some arrangement with More & Fogus to that effect, but upon the day set for hearing, the counsel thus engaged were dismissed by More & Fogus, who were then only nominal defendants, and withdrawing the defense which had been interposed by this plaintiff, the parties took judgment for the enforcement of their liens, and a decree ordering the sale of the improvements in the Oro Fino mine was duly entered. Shortly after the defendants took out an execution for the sale, and the sheriff was proceeding thereunder, when the plaintiff brought the present action to restrain the sale, to have the liens set aside and annulled, and that the defendants be enjoined from the benefits of said decree of foreclosure and sale.

As the ground of this relief the plaintiff claims that it is the owner of all the right and title of the said More & Fogus, to wit, the owner of five hundred and sixty-two and one half feet of one thousand feet of the Oro Fino mine by deed of transfer of October 8, 1866; that by an agreement with its grantors, the suit being at the time pending, the plaintiff was to employ counsel to attend to the trial of the rights of the parties, and that the plaintiff did so employ counsel; that on the day fixed for the hearing the said More & Fogus came into court, dismissed the counsel so employed by plaintiff, substituted other counsel by whom no defense was made, and judgment was taken upon confession against said More & Fogus, and a decree entered thereon ordering the enforcement of the liens.

The plaintiff alleges that this decree was obtained in fraud of its rights by collusion between More & Fogus, who were at the time of its rendition only nominal defendants, and the defendants in this action, and for the purpose of incumbering and charging the payments of these claims upon property not subject to any such liens. The plaintiff alleges that the work which was the basis of the liens was done as common laborers, and not as contractors; that it

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was done upon the whole mine of one thousand feet, and not the interest of said More & Fogus; and the said liens, upon which the said decree of foreclosure was based, were utterly invalid and insufficient. These are the substantial facts upon which the plaintiff seeks relief, and on this showing an injunction was issued by the district judge. To this complaint a demurrer and answer were filed, and afterwards an application was made to the district judge to dissolve the injunction upon the ground that the answer denied all the equities of the bill. The judge below refused the motion on the ground: 1. That the demurrer being an admission of the truth of the complaint, the defendants could not be allowed to use their answer to controvert its allegations; and, 2. That the facts stated in the complaint being admitted, showed a *prima facie* right to the relief prayed for.

As the reasons for that decision are purely technical and involve only a question of practice, in the absence of a full bench we pass them by, and propose to dispose of this motion on its merits. Before considering the main question, however, it will be proper to notice that part of the argument of the defendants which insisted that as the original suit was a proceeding in equity, no injunction would lie to restrain the execution of the decree of foreclosure and sale, and a somewhat broad challenge was made for the production of any case where a court of equity had enjoined proceedings under a decree entered in its own forum. This notion is in one sense correct. We find no instance where a court of chancery has restrained its proceedings, and for the simple reason that under the old equity system everything was directly under the control of the chancellor, and he enforced his decrees by the processes of orders and attachments. Counsel would hardly contend that a decree, once entered in a court of equity, must be executed and was irrevocable, although it bound and concluded the rights of parties who were shown to be strangers to the proceedings. The remedy in the old practice was to move to open and set aside the decree. (See Story Equity Pl., p. 472, sec. 426.) Or, if it was pending the action, to move for a stay

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of proceedings. A motion for an injunction was not necessary, because the proceedings would be stayed by an order from the chancellor. But as the statute provides under the code that decrees shall be enforced by the writ of execution the same as a judgment at law, it can, for the purpose of remedial proceedings, be treated in the same manner as a judgment rendered by a court of law. Or if, in closer analogy to the ancient practice, we adopt the rule of opening the decree and staying proceedings by an order issued on a showing, we reach the same results. For the sake of harmonizing the practice in legal and equitable cases, and to give effect to the spirit of our code, we incline to the opinion that the better practice is to proceed against a decree in order to annul or set it aside in the same manner as against a judgment rendered in a court of law. It will be seen that the doctrine here laid down does not conflict with the decision of Justice Harris referred to by counsel. (3 N. Y. Code Rep. 86.) That was a case where an injunction was prayed for pending the suit, not after decree. The court held that the motion to stay proceedings was the proper remedy. And the reason assigned was that the injunction could not be necessary, because, under the code, the defendant had a right to interpose his equitable defense to an action at law.

We conclude, therefore, that under the code, when decrees in equity and judgments at law are enforced by the same process, viz., that of execution, the same remedies apply in cases when it is sought to annul and set them aside. The other objection, that the bill itself is an insufficient showing for an injunction, we pass by, because such questions are properly raised on demurrer only, and not before us. How far a judge should go in determining the legal sufficiency of a bill before an injunction, we will not undertake to define. A *prima facie* showing certainly should be made, but what this is we will not now stop to inquire. To go into the case as suggested in the argument would require the same scrutiny that it would to pass upon the demurrer, and that we think clearly beyond the province of the judge in such a case. The defendants insist that

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their answer denies all the equities stated in the bill, and upon the settled rule in such cases the injunction should be dissolved.

This rule, however, being founded upon the old idea that when two parties in a suit affirmed with equal positiveness that an opposite state of facts existed, the chancellor must offset the one against the other, has always been acted upon with strictness. The party denying must controvert directly every material allegation of the bill. He must not undertake to set up new facts—must not confess and avoid. It must simply be a plain, direct, unequivocal denial. The rule is well stated in Whittaker's Practice, vol. 1, p. 479: "When the whole equity of the complaint is denied by the answer, the defendant is entitled to a dissolution of the injunction, *pendente lite*, until the plaintiff's title is established by proper evidence on the hearing of the case. But to have this effect the denial of such equities must be full and specific, and must cover the whole ground. If facts are admitted which qualify a general denial; if the denial be evasively made; or if, on examination of the circumstances, the court deem that the facts warrant the continuance of the injunction, notwithstanding a formal denial may have been made, the rule will not be applied." (See Whittaker, *supra*, and other authorities there cited.)

We will not take the time to go into the answer in this case and show that it is insufficient to support the motion. It may suffice to say that its denials are in some of the most material matters merely formal and technical; that it is in some material portions evasive and special, and is a better specimen of ingenious denial than ingenuous pleading. The defendants deny that the plaintiff has any interest in the property on which their liens are foreclosed, and yet admit that the parties against whom they foreclosed those liens had given plaintiff a deed prior to the decree of sale. They deny that the plaintiff, with the consent of More & Fogus, ever employed counsel to defend the suit upon which decree was entered, and yet admit that attorneys were employed and did appear, and were dismissed by More & Fogus, and other attorneys substituted. They deny

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that the work and labor upon which their mechanics' liens were based were performed on the whole of the one thousand feet belonging to the mine, and admit that More & Fogus owned only five hundred and sixty-two and a half feet undivided of the mine, which renders the denial a solecism, because it is a physical impossibility to work on the interest of More & Fogus alone. They deny that they were "not contractors," as alleged in the complaint, but do not state in affirmative form—which would have been the proper way—what their "contract" was. We repeat, such denials as those referred to above can not be treated as "full, direct, and specific." They are, in the language of the authority quoted, "evasively made," and do not entitle the party to the favorable action which he seeks.

There was some reference made to the question of the proper parties, but that is more properly a matter to be addressed to the court below in the progress of the cause. The court has the right at any time to call in other parties or to cause the proceedings to be amended in that particular by striking out or adding the names of any parties which may be necessary to accomplish the ends of justice and secure the interests of all.

The judgment will be that the order of the judge below denying the motion to dissolve the injunction be affirmed, and that the case be remanded with an order to proceed with the cause.

Order affirmed.

B. F. LAMKIN, RESPONDENT, v. E. C. STERLING, APPELLANT.

EXCEPTIONS—PRACTICE.—It is undoubtedly the general rule that when a party seeks to reverse a judgment rendered in the inferior court, he must except to the ruling of the court and assign the error in this court on appeal.

IDEM.—The exceptions to the rule that exceptions must be first taken in the court below are where a complaint is so radically defective that it discloses no cause of action and will not support a judgment; and where a judgment has been taken by default and the appellant could not except by reason of his non-appearance, and who was bound to see that the proceedings were regular and legal.

Argument for Respondent.

IDEM.—When there is sufficient in a complaint to support a judgment, notwithstanding it may be defectively stated and open to demurrer in the first instance, still if the judgment thus rendered be not excepted to, the appellant has lost his rights, and can not reverse the judgment, however patent the error.

IDEM.—There is no rule of practice governing legal proceedings more clearly defined, nor better settled, than that any objections of whatever character, whether with reference to the regularity of the proceedings on the trial of the cause, or to error of law committed by the judge in relation to a motion, or of any ruling whatever on a question of law arising during the proceedings, must be taken at once, at the time when the question arises.

IDEM.—The code has denominated the hearing and disposing of questions or issues of law, trials. When, therefore, a cause is called to dispose of any issue, whether of law or fact, it is, in contemplation of section 191, called for trial, so far at least as to require all rulings of the court which it is desired to have reviewed in an appellate court incorporated into a bill of exceptions.

APPEAL from the third judicial district, Ada county. The alternative mandate was issued, commanding the territorial treasurer, E. C. Sterling, to pay a certain warrant described in the writ, or that such treasurer show cause to the contrary on the first day of December, 1866, before the district judge at his chambers. On the return day, a motion was filed to quash the writ on the ground that "the affidavit upon which said writ was granted does not state facts sufficient to entitle the plaintiff to said writ, or to constitute a cause of action." This motion was denied, to which ruling no exception was taken. There was no other or further defense interposed. The peremptory writ was afterwards ordered to issue.

S. P. Scaniker, for the appellant.

Miller & Prickett, for the respondent:

No exception was taken by the appellant to any ruling or decision of the judge below. Objections must be taken on the trial below; they can not be taken for the first time in the appellate court. If exceptions to the rulings below be not taken at the time, they can not be urged on appeal. There is no assignment of errors on file in this case. By assignment of errors, as the term is used in this court, is meant a specification of the errors upon which the appel-

Argument for Respondents.

PRESUMPTION.—An appellate court will not presume error in the court below, and thus throw the *onus* on the respondent of establishing its correctness. “All intendments must be in favor of sustaining the judgments of courts of original jurisdiction, and to disturb such judgment it is not sufficient that error may have intervened, but it must be affirmatively shown by the record.”

PRACTICE—AFFIDAVITS—CERTIFICATE.—Affidavits used on motions which are incorporated into a transcript on appeal must have the certificate of the judge or the clerk that they were the affidavits used on the hearing on the motion.

APPEAL from the third judicial district, Owyhee county. Judgment by default against the defendant, a mining corporation. Subsequently, the defendant moved to “set aside the default and judgment,” which motion was denied by the court. To this ruling the defendant took no exception “at the time,” but gave verbal notice in open court that it “would appeal said cause,” and asked a stay of proceedings for five days, which was granted. There is copied into the record quite a number of affidavits, but there is no certificate of the judge or clerk that they were the affidavits used on the hearing on the motion. The clerk certifies at the close of the transcript “that the foregoing is a true and correct copy of the original notice and motion to set aside judgment,” and also a true copy of affidavits of certain persons whose names are enumerated in the record entry, and some other papers and their ends.

Martin & Johnson, for the defendants.

Huggan & Ganahl, for the respondents:

To the affidavits there is no certificate of the clerk or judge that they were the affidavits used on the hearing of the motion. The appeal in this case is either from the judgment or from the order refusing to set aside the same, or from both. If from the judgment alone, a copy of the judgment roll should have been sent up with the transcript. This not having been done, the appeal should be dismissed. (Laws of Idaho, sec. 294, p. 142; *Hart v. Plume*, 14 Cal. 148.) If the appeal is taken from the order alone, the appeal should be dismissed:

1. Because no exception was taken to the order of the

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court overruling the motion to vacate the judgment. The mere notice of appeal in open court means nothing, say the supreme court of California. No exception having been taken to the ruling of the court as before stated, the action of the lower court in this respect can not be reviewed on appeal. (*Smith v. Curtis*, 7 Cal. 584.)

2. Because there is no certificate of the clerk or judge that the affidavits embraced in the transcript were those upon which the motion to vacate the judgment was heard and upon which the order was based. "On an appeal from an order made on affidavits no statement is necessary. The affidavits must be annexed to the order, and the clerk should specify the affidavits used; and to do so he must at the time mark them as filed on the motion." (*Paine v. Linhill*, 10 Cal. 370; see also *Stone v. Stone*, 17 Id. 513.) If the appeal be from both the judgment and the order, the same will equally apply.

McBRIDE, C. J., delivered the opinion of the court, CUMMINS, J., concurring.

This appeal is taken from the ruling of the court below on a motion made by defendant to set aside a judgment obtained by default in favor of plaintiffs, which judgment appears to have been for the sum of four hundred and seventy dollars and eighty cents and costs, as set forth in the notice of appeal.

It does not appear that any exception was taken to the ruling of the court on the motion, and as the whole ground of the appeal is upon that ruling, under the rule announced in the case of *Lamkin v. Sterling* at this term, the appeal must be dismissed. We may add to the authorities mentioned in that decision, the case of *Smith v. Curtis*, 7 Cal. 584.

Appeal dismissed, and the judgment below affirmed.

CUMMINS, J., delivered the opinion of the court on the petition for rehearing, McBRIDE, C. J., concurring.

The appellant petitions for a rehearing of this cause on the alleged ground that the judgment dismissing the appeal

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and affirming the judgment of the court below, was erroneous. The appeal was dismissed in this court for the reason that the appellant had taken no exception to the ruling of the court below denying the motion to set aside the judgment and open the default. The decision was given upon the authority of the case of *Lamkin v. Sterling*, ante, decided at this term, in which we took occasion to examine all the accessible authorities bearing upon this question. On a further examination of the authorities required by this petition, we are confirmed in our exposition of the law made in that case. It is the better rule of practice, and often narrows down the number of issues presented for examination in the appellate court.

But even if we were to consider the case upon the record brought into this court, waiving the want of a bill of exceptions, we can not see that a different result would be attained. The judgment debtor appeals from the judgment rendered in the case, together with the order above referred to, but no part of the judgment roll proper is brought up. Yet the appellant complains of the sheriff's return of his service of the summons and complaint upon the defendant as being insufficient in several respects.

We are unable to ascertain from the record what the return is; it does not disclose anything even purporting to be the return of the sheriff. It is also complained that an amendment was made to the return, but that there is no record entry of the court granting the sheriff the privilege of making an amendment. This mode of taking appeals can not be tolerated. An appellate court will not presume error in the court below, and thus throw the *onus* on the respondent of establishing its correctness. "All intendments must be in favor of sustaining the judgments of courts of original jurisdiction, and to disturb such judgment, it is not sufficient that error may have intervened, but it must be affirmatively shown by the record." (*White et al. v. Abernathy et al.*, 3 Cal. 426.) Not having, as already remarked, incorporated into the transcript any part of the judgment roll, including the sheriff's return, nor all the journal entries in the case, as appears from the no-

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tice of appeal, we can not say that any error was committed in the court below. Under section 249 of our civil practice act, a party appealing from a final judgment, which is this case in part at least, shall furnish the appellate court with a copy of the judgment roll, and the statement annexed, if there be one. And if the appellant fail to furnish the requisite papers, the appeal may be dismissed. But, further, there is no certificate of the clerk or judge that the affidavits copied into the transcript were those used on the hearing of the motion in the court from which this appeal is taken, which is necessary.

Petition for rehearing denied.

M. FEIRBAUGH ET AL., APPELLANTS, v. J. MASTERSON, RESPONDENT.

POSSESSORY RIGHTS—PRIOR POSSESSION—EVIDENCE OF TITLE.—It is a well-settled rule in relation to possessory rights that prior possession is *prima facie* evidence of title.

PRIOR POSSESSION.—To entitle a party to hold by right of prior possession, there must be an actual, *bona fide* occupation, a *possessio pedis*, a subjection to the will and control.

IDEM.—It is not necessary that the occupant should cultivate the property claimed. It is sufficient if it be subjected to his use in the manner pointed out. Neither is any particular kind of inclosure required where a party is in possession of the land marked by distinct monuments of boundary, whether the same be a natural or an artificial inclosure. Claiming a title to the whole tract, the possession of the part so occupied will draw after it the possession of the whole.

PUBLIC LANDS—ACTUAL POSSESSION.—In relation to public lands which are not mineral lands, the title, as between citizens of the territory, where neither connects himself with the government, is considered as vested in the first possessor, and to proceed from him. This possession must be actual, and not constructive.

PRIOR POSSESSION—ACTUAL POSSESSION.—Where reliance is placed upon the prior possession of the plaintiff, or of parties through whom he claims, such possession must be shown to have been actual in him or them. By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property.

NOTICE.—The lines were pointed out to the defendant by the plaintiffs with reasonable accuracy, and we see no good reason why actual notice is not

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equally as good so far as bringing home to the defendant a knowledge of the plaintiffs' rights are concerned, as that afforded by stakes or like monuments.

IDEM.—Having gone into the actual possession of a portion of the premises, they were entitled to a reasonable length of time in which to inclose them. What this length of time should be must, for the most part, depend upon the particular circumstances and locality of each claim.

POSSESSION OF PART.—If a party were to locate and claim for agricultural purposes a tract of land, and were to reside upon, inclose, and cultivate a portion of the same, having artificial monuments sufficient to indicate generally the boundaries of the entire claim, this would most certainly be a substantial compliance with the rule, and such possession of a part would draw after it the possession of the whole.

ASSIGNMENT OF ERROR—PRACTICE.—The supreme court will not scrutinize a voluminous transcript to ascertain whether the inferior court may possibly have committed some error to the prejudice of the complaining party, unless it should first have been assigned.

APPEAL from the third judicial district, Owyhee county. It is quite impossible to give a much fuller detail of facts than is contained in the opinion of the court. Reference is made in the transcript to a map of the premises as giving a very accurate description of them, the location of the "cabins," the amount and location of the fencing, etc., but this map was not sent up, or has been lost. Hence, all these facts were ascertained alone from the evidence of the witnesses as written down by the clerk on the trial.

Curtis & George, Miller, and Huggan, for the appellants:

The supreme court in the state of California have held, in the following cases, that proof of prior possession is enough to maintain ejectment against a mere naked trespasser: 4 Cal. 34, 69, 78, 96, 278, 293; 5 Id. 250, 486; 7 Id. 39, 153, 302; 9 Id. 5, 437.

Henry Martin, for the respondent.

CUMMINS, J., delivered the opinion of the court, **McBRIDE, C. J.**, concurring.

This was an action of ejectment for the recovery of premises situate in Owyhee county. A jury having been expressly waived by the parties, a trial was had by the court. The judgment was for the defendant, after which the plaintiffs move for a new trial upon the grounds:

1. That the findings of the court and the judgment thereon are against law.

2. For errors in law occurring on the trial and excepted to on the part of the plaintiffs.

This motion was denied by the court, from which order denying a new trial an appeal is taken to this court. The testimony was reduced to writing by the clerk by order of the court, and is incorporated in the record. The pleadings are in the usual form in actions of this character, plaintiffs alleging that they were in the quiet, peaceable, and exclusive possession prior to defendant's entry upon the disputed premises, which is traversed by the defendant.

It is contended by the appellants that the "findings of fact by the court below are against the evidence and unsupported by law." It is a well-settled rule in relation to possessory rights that prior possession is *prima facie* evidence of title. This principle is firmly fixed in the jurisprudence of the country. Much difficulty, however, is often met with in the proper application of this rule to given cases. In this case it appears from the evidence that the plaintiffs went upon the tract of land described in their complaint, and which consists of about three quarter sections, about the sixteenth of August, 1864; that several days subsequent to this they commenced inclosing this tract of land with a fence; that during this time they were residing upon the premises, and engaged at times in making shingles. After they had completed about three fourths of a mile of their fence, the defendant came upon the premises, and after marking a few trees, had a conversation with some of the parties who were then claiming the land, at which time the plaintiffs notified him that they claimed the land, pointed out the fence they were then engaged in building, and further pointed out to him the general boundaries of their claim as accurately as they well could do. The defendant then requested one of them to go with him and point out more particularly the boundaries of their claim; but, after proceeding a short distance beyond the fence, the defendant declined going any farther, after which he proceeded to inclose a tract of land included within the limits pointed out

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to him as the lines bounding plaintiffs' claim. The plaintiffs continued at work until they completed their fence, which was some six weeks subsequent to their location. It does not appear that the defendant ever resided upon the tract of land he claimed, although he entirely, or nearly so, inclosed it with a fence and commenced the erection of a cabin thereon. As to the character of the fences of both parties there is some conflict of testimony, though it seems they were made by felling trees and putting brush together, sufficient in many places to turn stock, in others not. These facts are well established by the evidence. It is proper here to remark that the premises claimed by the defendant, being one hundred and sixty acres in extent, are those in dispute in this action.

The question now presents itself upon this state of facts: Did the plaintiffs have actual possession of the premises in controversy at the time the defendant went upon them, which was about the twenty-fifth of August, 1864? Was the occupancy of the plaintiffs at that time an actual, peaceable, and exclusive possession of the entire premises claimed by them, including that portion subsequently claimed by the defendant, such as is sufficient in law to entitle them to the exclusive enjoyment of the same as against every other claimant except the general government?

The supreme court of California, in the case of *Plume v. Seward et al.*, say, in relation to this subject, that "there must be an actual, *bona fide* occupation, a *possessio pedis*, a subjection to the will and control, as contradistinguished from the mere assertion of title, and the exercise of actual acts of ownership, such as recording deeds, paying taxes, etc. This being the case, it becomes necessary to inquire, if a party who enters on land with no higher claim of title than that which the law presumes from his possession, is entitled to claim more than the quantity thus actually occupied by him. This question has been frequently decided in most of the western states, where entries have been made upon public lands by persons unable to reduce the whole of the lands to actual occupation by fencing and cultivation. These entries have for the most part been made by settlers

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claiming one hundred and sixty acres under pre-emption laws, or some local custom on the subject. In many cases the occupation of a portion of the land and the blazing of trees, so as to distinctly mark the extent and boundaries of the claim, have been held to operate as notice, and carry the possession to the whole tract; so the felling of timber around a tract of land, and the building of a brush fence, have been held as sufficient acts of the party in occupation of a part, to draw after them the possession of the land so inclosed. The character of the improvement must, in a great measure, depend upon the locality. It is not necessary the occupant should cultivate the property thus claimed; it is sufficient if it be subjected to his use in the manner pointed out. Neither is any particular kind of inclosure required where a party is in possession of the land marked by distinct monuments of boundaries, whether the same be a natural or an artificial inclosure. Claiming title to the whole tract, the possession of the part so occupied will draw after it the possession of the whole." (*Vide Plume v. Seward et al.*, 4 Cal. 95.)

And again the same tribunal held that "with the public lands, which are not mineral lands, the title, as between citizens of the state, where neither connects himself with the government, is considered as vested in the first possessor, and to proceed from him. This possession must be actual and not constructive, and the right it confers must be distinguished from the right given by the possessory act of the state. * * * * Where reliance is placed, not upon the act, but upon the prior possession of the plaintiff or of parties through whom he claims, such possession must be shown to have been actual in him or them. By actual possession is meant a subjection to the will and dominion of the claimant as is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property." (*Coryell v. Cain*, 16 Cal. 567.)

Applying the rule here laid down to the case at bar, we find that the plaintiffs had fully complied with all that is required by law in order to vest the right of possession in

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them and to render the subsequent entry of the defendant wrongful. Several days prior to defendant's entry, the plaintiffs, then residing upon their claim, had commenced the construction of their fence to inclose the same. It is true they had not marked or designated their boundaries by any artificial monuments, beyond their fence, but it is equally true that the defendant had actual notice of the extent of their claim. The lines were pointed out to him by plaintiffs with reasonable accuracy, and we see no good reason why actual notice is not equally as good so far as bringing home to the defendant a knowledge of the plaintiffs' rights are concerned, as that afforded by stakes or like monuments. The plaintiffs, as already observed, proceeded to the completion of their fence with reasonable diligence. Having gone into the actual possession of a portion of the premises they were entitled to a reasonable length of time in which to inclose them. What this length of time should be must, for the most part, depend upon the particular circumstances and location of each claim. In this case, as we have already stated, it does not appear that the plaintiffs unnecessarily delayed the completion of their inclosure. Residing, then, upon or being in actual possession of a portion of the tract of land claimed by them, the right of possession of the entire tract so inclosed was vested in the plaintiffs. This possession dated from the time they entered upon and located the premises. It is not absolutely necessary in all cases, as was seen from the authorities above read, in order to entitle a party to the exclusive occupation and enjoyment of a land claim, segregated, as it were, by him from the public domain, that he should have first inclosed it by a substantial inclosure, although this is undoubtedly one of the highest evidences of actual possession. It may be evidenced by any appropriate and lawful use, according to the particular locality and quality of the property, and the purpose of the occupation. If a party were to locate and claim for agricultural purposes a tract of land, and were to reside upon, inclose, and cultivate a portion of the same, having artificial monuments sufficient to indicate generally the boundaries of the entire claim, this

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would most certainly be a substantial compliance with the rule we have here laid down, and such possession of a part would draw after it the possession of the whole. A different rule from this would work an unnecessary hardship in a large majority of cases.

In looking over the testimony, therefore, in this case, we are necessarily brought to the conclusion that the plaintiffs were in the actual and exclusive possession of the premises in controversy at the time the defendant entered upon the same. This conclusion is strengthened by the conduct of the defendant himself at the time. He was not only shown by the plaintiffs the boundaries of the claim they were then asserting a right to, or dominion over, but he attempted to negotiate a purchase of an interest in this ranch from one of the claimants, thus recognizing, to some extent, their right of control over and interest in the same.

If we are correct in our construction and exposition of the law governing possessory titles, it follows that the court below erred in its finding as facts that the plaintiffs did not take possession of the premises set out in the complaint about the sixteenth of August, 1864, and were not entitled to the possession of the same at the time of the alleged ouster. These conclusions of fact are entirely unsupported by the evidence, or were, we might say, in direct opposition to it.

As this disposes of the case in this court it is unnecessary for us to inquire into the correctness of the rulings of the court on the trial to which exceptions were taken at the time. In fact, they have not been included in an assignment of errors, and we have just decided at this term in the case of *The People v. John C. Page*, that we will not scrutinize a voluminous transcript to ascertain whether the inferior court may possibly have committed some error to the prejudice of the complaining party, unless it shall first have been assigned as such.

Judgment reversed and a new trial awarded.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

AUGUST ADJOURNED TERM, 1867.

PRESENT:

HON. JOHN R. McBRIDE, CHIEF JUSTICE.

HON. MILTON KELLY, } JUSTICES.

HON. JOHN CUMMINS, }

THE PEOPLE, EX REL. A. C. SPRINGER, *v.* JOHN
A. LYTLE.

STATUTES—REPEAL.—A general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent.

IDEM.—A statute clearly repugnant to a prior one necessarily repeals the former, although it does not do so in terms.

IDEM.—Though a subsequent statute be not repugnant in all its provisions to the prior one, yet if the latter was clearly intended to provide the only rule that should govern in the case provided for, it repeals the original act.

IDEM.—The act of January 7, 1867, creating the office of tax collector for the county of Owyhee, is repealed by the act passed at the same session, January 11, amending the revenue law.

ADJOURNED into this court from the third judicial district, Owyhee county. An information in the nature of a *quo warranto* on the relation of the sheriff of Owyhee county against the defendant, Lytle, for usurpation of the office of

Argument for Relator.

tax collector of that county. At the June term, 1867, of the district court for that county, the parties by stipulation submitted certain issues in controversy, which were certified into this court by the presiding judge, for decision. The following are the material portions of said stipulation:

1. That heretofore and on the eighteenth day of February, 1867, said relator, Amos C. Springer, was appointed tax collector of said county by the governor of said territory.

2. That the said relator, A. C. Springer, was, at the last general election in said Idaho territory, duly and lawfully elected to the office of sheriff of said county of Owyhee, and *ex officio* tax collector thereof, for the term of two years from the first Monday of January, 1867; and that he has in every manner and respect qualified as such sheriff as required by law, and has ever since the day aforesaid been *de facto* and *de jure* the sheriff of said county, and has tendered to the proper officers his official bond in manner required by law, and has at all times been ready to perform the duties of tax collector of said county of Owyhee *ex officio* as such sheriff.

3. That on the twenty-third day of February, 1867, in pursuance of an act of the legislature of said territory, entitled "An act to create the office of tax collector for the collection of revenue in and for the county of Owyhee," passed January 7, 1867, said defendant was appointed by the board of county commissioners of said county tax collector, and on the first day of March duly qualified as such and entered upon the duties of said office.

The questions submitted are as follows: 1. Is the defendant, John A. Lytle, entitled to said office of tax collector of said county of Owyhee? or, 2. Is said relator, Springer, entitled to said office of tax collector and to exercise the duties thereof? The other facts appear in the opinion of the court.

E. J. Curtis, district attorney, L. P. Higbee, and McQuade & McQuade, for the relator:

The act creating the office of tax collector for Owyhee county, passed January 7, 1867, was repealed by act of

January 11, 1867. (4 Ses. L. 43, 116.) The effect of the passage of a subsequent act is to repeal all former acts as far as they conflict. (*Dobbins v. Sups. Yuba Co.*, 5 Cal. 415; *People v. Cranch*, 10 Id. 316; *Scofield v. White*, 7 Id. 401; *Crosby v. Patch*, 18 Id. 441, 442; *People v. Grippen*, 20 Id. 678.) By act of January 11 (4 Ses. L. 43), the law was restored as it existed prior to the passage of the act of January 7. (4 Ses. L. 116.)

Martin & Johnson and Ganahl & Huggan, for defendant:

The office of sheriff and that of tax collector are public offices. (*People v. Edwards*, 9 Cal. 292.) In this country the incumbent has no property in his office; and when the relator accepted the office of sheriff there was no “principle known or recognized under our institutions and laws upon which he can claim to restrict the power of the legislature over the duties and fees of the office.” (*Conner v. The Mayor and Council of N. Y.*, 5 N. Y. 300; *Warner v. The People*, 7 Hill, 81; 2 Denio, 272.) The acceptance of a public office does not create a contract respecting property. (5 N. Y. 295, 296, 299.) The act to create the office of tax collector for the county of Owyhee is a special act, and relates only to that particular office; and the object of this act is in no way affected by the general revenue act of the territory, or its amendments. The office of tax collector of Owyhee county was the sole object of the former act, while the whole subject of territorial and county revenue is embraced in the latter; and as to its single object the former must control. (*Dobbins v. Yuba County*, 5 Cal. 414; *People v. Wells*, 11 Id. 338, 339; Sedg. on Stat. and Const. L. 247, citing language of Lord Mansfield; Id. 123, 124.) The law does not favor repeals by implication. (*Scofield v. White*, 7 Cal. 401.)

CUMMINS, J., delivered the opinion of the court, McBRIDE, C. J., concurring.

On January 7, 1867, the legislative assembly passed a bill, notwithstanding the governor's objections to the same, creating the office of tax collector for the county of Owyhee.

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Prior to that time, the sheriffs in their respective counties, except in that of Boise, were *ex officio* tax collectors. The act above referred to was designed to take away these duties and erect them into a separate office. On the eleventh of the same month the revenue act was passed, in which the following provision is found, at the end of section 6: "*Provided, further, That in all other cases of the collection of taxes the sheriff of the county shall be collector of all taxes except in the county of Boise, in which county the assessor shall be collector of all poll taxes, per capita and hospital taxes, and all taxes upon real and personal property.*" By the provisions of this section the assessor is the collector of all poll, *per capita*, and hospital taxes, and of personal property taxes in certain specified cases until the completion and return of his assessment, and in "all other cases" it is made the duty of the sheriff to perform this service, except in the single county of Boise. The first clause of section 27 of this act reads, that "all acts and parts of acts inconsistent herewith are hereby repealed." It will be observed that this act was passed four days after the passage of the act creating the office of tax collector for the county of Owyhee.

The first question presented by the record for determination to which our attention has been directed is, Do these provisions of the revenue act, which are above quoted, repeal the tax collector's act for Owyhee county? It is urged by the defendant that as the latter act refers to a single subject and is special in its nature, therefore the provisions of a general law, such as the revenue act, do not necessarily repeal it; that the two acts may stand together, and effect and force be given to both according to their spirit and intention. The abstract rule contended for by the defendant's counsel is well stated by Mr. Sedgwick, in his treatise on statutory and constitutional law. On page 123 he says: "In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule, that a general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent." In fact, the coun-

sel for defendant referred to this authority to sustain their position.

While in its main features the revenue act is general, yet section 27 of the old act, as amended by the sixth section of the act of the last session, is quite as special in its provisions as is the tax collector's act, and both referring to the same subject, to wit, the proper officers for collecting the several classes of taxes levied in each county, excepting that the one is to have no effect beyond a single county.

In order to give effect to the act, the benefits of which are claimed by the defendant, it would not only be necessary for us to engraft a second exception upon section 6 of the revenue act of January 11, 1867, which, by express terms, excepts Boise county alone, but it would be necessary to entirely disregard the negative words of the twenty-seventh section, a proposition repugnant to every sound rule recognized in the construction of statutes. It is well settled that a subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, although it may not do so in terms, and even if the subsequent statute be not repugnant in all its provisions to the prior one, yet if the latter statute was clearly intended to provide the only rule that should govern in the case provided for, it repeals the previous act. (*Vide* Sedg. on Stat. and Const. L. 124.) It has been repeatedly held that every statute is by implication a repeal of all prior statutes so far as it is contrary and repugnant thereto, and that without any repealing cause. (*Id.* 125.)

In the case we are considering, these two acts are manifestly repugnant and irreconcilable. The one declares that the sheriff in all the counties, excepting one county only, shall collect all the taxes not collected by the assessor; and further declares that all acts and parts of acts which are inconsistent herewith are absolutely repealed; while the other act, of a prior date, declares that in Owyhee county, which is not the excepted county, the sheriff shall not collect these taxes. Can it be said, then, with any degree of candor, that these two acts are not repugnant in

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this respect? If they are irreconcilably in conflict, as they most certainly are, then the rule universally recognized in cases of this character must prevail, that the last act in point of time must be held to repeal those of a prior date.

This case is not at all analogous to the examples or illustrations given, in reference to the rule we are discussing, by the authority above referred to, as, for instance, the case where, by an act of parliament, individuals were authorized to inclose and embank portions of the soil under the river Thames, and declared that such land should be "free from all taxes and assessments whatever." By the land tax act subsequently passed, it was provided in general terms that all the lands in the kingdom were subject to taxation; yet it was held that this latter act did not repeal the former, it being special in its character, while the latter, being general, necessarily included the exception created by the other. While this is a sound rule of interpretation, yet it in no way meets the case at bar, for in this case, as already observed, not only are the provisions of the two acts relating to the subject as to who shall collect the taxes inconsistent, the one requiring the sheriff in certain cases to perform the duty, and the other requiring a different officer altogether; but one expressly declares that all provision of law now existing repugnant to or inconsistent with the terms of this act are repealed, providing at the same time, as stated, that the sheriffs in nearly all the counties, including Owyhee, shall collect the taxes.

We, therefore, can give no other interpretation to the sixth and twenty-seventh sections of the revenue act of January 11, 1867, than that they repeal the act of the seventh of the same month, creating the office of tax collector for Owyhee county, and there is, of course, now no such office in that county, except as provided for in the former act. And hence we are of opinion that the relator is entitled to exercise the powers, perform the duties, and receive the emoluments of the office of tax collector by virtue of his election as sheriff, on qualifying as required by law.

As this is sufficient upon which to dispose of this case in this court, we decline going into the remaining question,

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that of the appointing power, raised by the submission. As the two questions submitted in this controversy, under the tax collector's act, are decided in the negative, judgment will be that each party pay his own costs, as per stipulation.

Judgment accordingly.

DAN ROTH, APPELLANT, v. JOHN DUVALL ET AL.,
RESPONDENTS.

SHERIFF—SERVICE OF PROCESS.—It is well settled that a sheriff can not refuse to serve process regularly issued to him because in his opinion it is defective or irregular.

EXEMPT PROPERTY—JUDICIAL DISCRETION.—The question as to whether property is exempt from execution involves the exercise of judicial discretion, and its decision is not confided to the action of the attaching officer.

SHERIFF—INDEMNIFICATION.—When the sheriff has doubts as to the legality of a levy in the first instance, he may refuse to execute the writ unless indemnified; but if he does attach and returns his writ, he places all question as to its validity before the court.

SHERIFF—PRESUMPTION.—Every intendment of law is in favor of the regularity of the proceedings of a sheriff under an attachment or execution, and nothing but willful disregard of the rights of others will subject him to liability.

ATTACHED PROPERTY—APPLICATION FOR RELEASE.—An application for the release of property held under attachment or execution returned into court, should be made to the court or judge, and not to the attaching officer.

SHERIFF.—If a sheriff execute the writ on property, and does not affix such a value as will charge him with less than the plaintiff's claim, he is presumed to have satisfied himself that he had sufficient, and is chargeable on that basis.

APPEAL from the third judicial district, Ada county. An action on the official bond of the sheriff. After the motion on the pleadings for judgment was denied, a trial was had by the court, and judgment rendered for defendants on the ground that the property levied on under the attachment was exempt from execution, and was for that reason released by the sheriff. The objection that the sheriff could not justify his action in releasing the property under his return on the execution because such return was

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made after the time allowed him in which to make such return had expired, was not made in the court below. After final judgment, an appeal was taken to this court, without interposing a motion for a new trial.

Scaniker & Burmester, for the appellant.

Miller & Prickett, and W. A. George, for the respondents.

MCBRIDE, C. J., delivered the opinion of the court, CUMMINS, J., concurring.

This case is an appeal from the district court of the second judicial district, and the error assigned is that a motion by the plaintiff for the judgment on the pleadings was overruled and excepted to. This exception is brought here for review, and its validity depends upon whether the defendants in their answer set up any defense to the action.

The defendants claim that the plaintiff has not shown that there is any point properly brought for review before this court. The fact seems to be that when the judge overruled the motion of plaintiff in the court below, the plaintiff excepted to the ruling, and the judge certifies to the fact, and to the use of certain records on the hearing of that motion. This ruling of the judge is appealed from, and the plaintiff, in his brief, points out the ground of objection. This we think sufficient to bring the point decided before this court. The exception being taken, and noted by the judge at the time, and on appeal the plaintiff having assigned the judgment as error, it is properly before this court.

We proceed, therefore, to consider the questions presented by this exception. The facts, as presented by the pleadings and accompanying papers, are as follows: The plaintiff, Roth, on or about the twenty-fifth day of February, A. D. 1867, brought a suit in the district court of Ada county, against one Dr. Ephraim Smith for the sum of two hundred and sixty dollars, and interest and costs, and by a writ of attachment issued in said suit the defendant, Duvall, as sheriff of said county, levied upon certain goods and personal property belonging to the defendant to secure the

claim of the plaintiff in said suit. The return of the sheriff on the attachment shows that he took possession of the goods, and gives a schedule of the same; that they consisted of various drugs and medicines, and the bottles and jars in which they were contained.

On the eighth day of March following the levy of the attachment, the plaintiff, having obtained judgment against the defendant in the action, issued an execution thereon, directed to the sheriff and requiring him to make a return thereof within ten days. The sheriff received the execution on the same day last mentioned, and on the nineteenth day of March following made return of the same, stating therein that having become satisfied that the property which he had levied upon, under the writ of attachment, was exempt from execution, he had released it to the defendant, and that being unable to find any other property of the defendant, Smith, wherewith to satisfy the execution, the same is unsatisfied. These facts appear from the complaint and answer, and the writ of attachment and execution in the action of *Roth v. Smith*, referred to by them. It does not appear from the papers when the release of the property held under the levy of attachment was made, except that it does appear that it was after the receipt of the execution by the sheriff.

Under this state of facts the plaintiff brings this action against the sheriff and his sureties, and alleges that he is liable to him for the amount of the judgment recovered in the suit of *Roth v. Smith*, by reason of his failure to sell the property held under the levy by attachment, and for his neglect to make return of the execution in said suit within the time required. The defendants admit the facts stated in the complaint, but allege that the judgment in the suit of *Roth v. Smith* was invalid and irregular; that the execution in said cause was irregularly issued; that the attachment was wrongfully and unlawfully levied upon the goods of Smith; that the same were by law exempt from execution, and that being satisfied that such was the fact after the receipt of the execution, they released them.

Do these facts constitute a defense to the action in this

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case? It is well settled that the sheriff can not refuse to serve process regularly issued to him because in his opinion it is defective or irregular. (Drake on Attachment, sec. 185; also 15 Cal. 66.) We think, therefore, that so much of the defendant's answer as undertakes to defend this action by impeaching the regularity of the judgment and execution in the suit of *Roth v. Smith* is without merit, and should be disregarded. It sets up no fact which constitutes any defense. If the defendant in that suit, Smith, did not choose to attack those proceedings, the sheriff can not be permitted to do it for him, and however defective they may have been, the latter had nothing to do with the case except to execute the process in the usual way.

The next matter of defense is that the property taken by the sheriff, under the attachment, and afterwards released under the execution, was exempt and not liable for the plaintiff's judgment, and the defendants claim that this being the case, the plaintiff could not be damaged by reason of his failure to make the money, for the reason that a levy upon the property would have been illegal. To determine the question properly, we must consider what the rights and duties of the officer are under such circumstances.

By the statute of 1864, it was provided that when property is levied upon by the sheriff under attachment or execution, and it is claimed to be exempt from execution, the sheriff was directed to impanel a jury of discreet persons to examine and determine the question, and if the decision was adverse to the claim of the debtor, he was permitted to give bond with sufficient sureties and have the controversy submitted to the court for its decision.

These provisions of the practice act were repealed by the legislative assembly at its third session, and there is now no method for determining a controversy as to whether property is or is not exempt specifically pointed out by the statute. It is now provided that when a third party claims the property taken by the sheriff he shall summon a jury of six men who shall hear and determine the validity of the claim, and authorizing the sheriff if the verdict be in favor of the claimant to relinquish the levy, unless the plaintiff shall in-

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demnify him, in which case he must proceed and sell. But this provision does not avail an execution creditor, and there is no statute at this time which directs any mode of proceeding in a case like the present. The question therefore is, What is the proper proceeding when property is attached and claimed to be exempt in order to procure its release? Is the sheriff authorized after he has attached it and has returned the writ into court to release it, and justify by showing that it was in fact exempt? If the law should permit him to determine the question, then, unless he was guilty of intentional error, it should protect him in whatever determination he might arrive at. This satisfies us that such a question is not confided to the action of the officer. Its release involves judicial discretion, and this doctrine is supported by the fact that even under the former statutory proceeding by a sheriff's jury, it was not conclusive, and a claimant might insist upon his right to be heard before the court upon giving bond; and even now, in the case of a claim by a third party, the creditor, by indemnifying the sheriff, may compel him to proceed, in defiance of an adverse decision by a sheriff's jury.

If the law did not allow a sheriff to be concluded by a verdict of the jury impaneled to try the question, can it be supposed that when the proceeding by such jury is abolished the question is to be referred to him alone?

When the sheriff has doubts as to the legality of the levy in the first instance, he may refuse to execute the writ unless indemnified, but if he does attach and returns his writ he places all question as to its validity before the court. Every intendment of law is in favor of the regularity of his proceedings, and nothing but willful disregard of the rights of others will subject him to liability. The writ when once returned is not in his power—the property itself is in the custody of the court, and an application for its release should be made, not to the sheriff, who holds it subject to the order of the court, but to the court or judge. We do not feel, in this case, that it is essential in order to sustain the decision which we shall render, to affirm that the sheriff would not be discharged if it should appear that the prop-

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erty which he attached was in fact exempt, for even if we admit that it was, yet the sheriff did not perform his duty as it clearly appears. By the writ of execution issued to him on the eighth day of March, 1867, he was commanded to proceed under said writ, and make due return within ten days. This he did not do. How is the court to know that he did not hold the property, which he attached on the twenty-fifth of February, during the whole time up to the day when the vitality of the writ of execution expired, and then released it? He should, at the least, have shown that the release of the property took place within the time required for the return to be made on the execution. Authority that an officer who does not return the writ within the time is personally liable on his bond for the amount claimed in the execution is abundant. If he does not return the writ it is presumed that it is because he has made the money, and if he has not done so he should make his return for his own protection and discharge. (12 Cal. 539; Crocker on Sheriffs, 170; 2 U. S. Dig. Sup. 777.)

Although it will be perceived that we are of opinion that a sheriff has no authority to release property which he has attached and made return of, even if it is exempt by law, but that such release should be made by order of the court or judge, the present case is made conclusive against the sheriff, by his neglect to return the execution. If he took the risk of releasing the property on the ground that it was exempt, he should, at least, to justify the act, show that the release took place within the time which was prescribed for the return of the execution. Not having done so, his liability is complete and fixed, and the right of the plaintiff to recover in this case we think clear.

The only further question is as to the value of this property. For his own protection, the sheriff should affix his valuation by the return; also for the information of the plaintiff. If he executes the writ on property, and does not affix such a value as would charge him with less than the plaintiff's claim, he is presumed to have satisfied himself that he had sufficient, and he is chargeable on that basis. To allow him the benefit of any other rule would be to permit

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him to defraud the plaintiff by a defective return, leading him to suppose he had ample security for his debt, and then protect himself by showing that he had not performed his duty. The writ directs him to attach and keep so much property as is necessary to secure the demand, and if he attaches less he should show it by his return, or he will be chargeable for the deficit. Any other rule would give a dangerous license to officers, and subject an attaching creditor to the risk of a fraud, against which he would be powerless to guard.

Sheriffs have extraordinary powers given them to enable them to perform their duties. When these are faithfully and honestly performed they are always protected; but such powers involve corresponding diligence and fidelity, and for any breach of official duty, either by negligence or design, they are held strictly accountable. The protection of litigants and the officer both require a rigid adherence to these reciprocal obligations. The judgment is, therefore, reversed, and the cause remanded to the district court, with a direction to enter a judgment for plaintiff for the amount of his claim, and also for the statutory penalty imposed in such cases.

OPINION OF PETITION FOR REHEARING.

CUMMINS, J., delivered the opinion of the court on petition for rehearing, McBRIDE, C. J., concurring.

Respondents move on petition for a rehearing of this cause chiefly upon the grounds:

1. Appellant raised and argued to the court other matters of alleged error on the part of the court below than the ruling of said court in denying plaintiff's motion for judgment on the pleadings; that "respondents were taken by surprise, there being no statement on appeal, or bill of exceptions, etc., that any matter whatever should have been argued by counsel, or considered by the court, except said ruling of the court below in overruling the motion for judgment;" and,

2. "Respondents were taken by surprise that evidence was used on the hearing other than the judgment roll proper," etc.

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If the first alleged cause of surprise were sufficient upon which to grant a motion of this character, there is scarcely a case argued in this court upon appeal that would not require the same order. It would certainly be a strange rule that because the appellant pursued a different line of argument in this court from that pursued in the court below, therefore, if successful, respondents could complain of being surprised, and for that reason be allowed to argue their cause again.

It is very seldom that precisely the same argument is twice made in all its particulars, especially when one is made during the progress of the trial at *nisi prius*, when it frequently occurs that but little time for deliberation and search among authorities is given. Besides, this court has but little to do with the particular reasons or arguments upon which the court below based its order denying the motion for judgment. The only question presented to that court for determination was the motion for judgment, predicated upon the assumed sufficiency of the complaint and the total insufficiency of the answer in law, it being claimed by the appellant that it did not even shadow forth a defense. This motion was denied, and it may have been primarily upon the ground that the property attached was exempt from forced sale on execution, and that the sheriff had the right to release such property, return *nulla bona*, and take upon himself to prove that such was its character, without any reference to the fact that the return on the execution upon which reliance is placed to justify the release of the property being mentioned. The only error complained of was the order of the district court denying this motion, and this was assigned as error in this court. Under this assignment of error it certainly was competent for appellant's counsel to adduce any argument their ability might suggest, which tended to show that the denying of such motion was denying to their client a legal right; and, as I have already remarked, the defendants attempted to justify their action in releasing the property levied on under the attachment, on the ground that it was exempt from levy, and so returned on the execution, or attempted to. Now,

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as the sheriff had the property when the execution was placed in his hands, and having already returned the attachment into this court, it became absolutely necessary for him to make return of his action in the premises on the execution and to justify by that return. Hence, this return became a legitimate object of attack by the appellant, and of impeachment if not sufficient in law under his motion for judgment on the pleadings, the return having been referred to in the answer. The objection to the sufficiency of the return was not an error which was required to be assigned in order that the complaining party might take advantage of it.

No statement on appeal was necessary, nor any other bill of exceptions than was furnished by the motion and the certificate of the judge that it was denied and the ruling excepted to at the time. This, as already observed, was the only error assigned, and the only one passed under review by this court.

The second ground of complaint is, that evidence other than the judgment roll proper was used on the hearing in this court. As was stated by the chief justice in the opinion of the court delivered in this case, the certificate of the judge before whom the trial was had, that certain official records were read on the argument of the motion in the first instance, together with the fact that the same records were referred to in the answer as containing a more full and explicit statement of the facts constituting the justification of the defendants, were sufficient on which to permit appellant to use these records on the hearing of the motion in the court below and on appeal.

As no issues of fact were desired to be reviewed by the appellant, there was no necessity of a motion for a new trial or a statement of evidence, and hence none was made. The language of the answer in referring to these records, after reciting a certain state of facts, is in these words: "As will more fully appear by the judgment roll on file in said clerk's office, and to which reference is hereby made."

It is also said that the action was virtually for a false return, and therefore the defendants were surprised that

Points decided.

counsel should have insisted on the liability of defendants on the ground that the sheriff failed to return the execution at all, or at least within the time required. On an examination of the complaint it will readily be seen that the action is based upon the liability of the sheriff for not making the judgment on execution, it being alleged that such sheriff had property in his hands at the time he received the execution out of which he might have satisfied the same, but that he failed and neglected to do so. Having had the property in his possession and keeping the execution beyond the time in which to make his return fixes his liability to the judgment creditor.

It is also complained that the respondents were not furnished with, or apprised of the appellant's points upon which he would rely for a reversal of the judgment, until the argument was commenced. This is true; but while it may be fault in the practice, it is nevertheless permitted by the rules of the court, and hence is no ground for rehearing.

I have thus carefully examined the petition for rehearing, but do not find sufficient in it to warrant this court in granting this motion. We are confirmed in the opinion that we took the correct view of the case in the argument already made, and that if we were to grant another argument the result would be the same.

Petition for rehearing denied.

THE PEOPLE, RESPONDENTS, v. DAVID SLOPER ET
AL., APPELLANTS.

TECHNICAL DEFECTS.—The initials "U. S." occurring in the title of an action by the people, is a technical defect, which does not affect the substantial merits of the cause, and hence should be disregarded.

CRIMINAL LAW—COUNTERFEITING GOLD DUST.—Simply passing counterfeit gold dust is not an offense under our penal code. The uttering must be accompanied with the knowledge that it is a false imitation, and it must have been the intention of the utterer to defraud the person receiving it.

UNDERTAKING.—The general rule is well settled that an undertaking taken for a purpose not authorized by statute is void.

Statement of Facts.

IDEM.—The undertaking need not set out the offense charged with the same technical particularity required in an indictment, but it will be sufficient if the offense be substantially described.

IDEM.—If a recognizance undertake to recite a specific charge, a charge must be recited for which an indictment will lie.

SURETIES—LIABILITY.—Sureties on an undertaking for the appearance of a party to answer to a criminal charge can only be held responsible in default of the appearance of the principal, in the event an indictment should be found for the particular offense set forth in the undertaking.

PARTIES—JOINT CONTRACT.—All parties jointly liable on a contract must be made defendants in an action on the contract.

APPEAL from the third judicial district, Ada county. An action to recover the penalty of the forfeited recognizance of the defendants. Judgment by default was entered June 2, 1866. Defendants appeal from this judgment. The material portion of the undertaking reads as follows: "Know all men by these presents, that we, James Sloper, as principal, and David Sloper and John Stapleton as sureties, are held and firmly bound unto the people of the United States in the territory of Idaho in the sum of one hundred dollars, conditioned," etc. The three parties above named sign the undertaking. It was further recited, that "from the testimony produced it was deemed by the court that the said James Sloper was guilty of the offense of passing counterfeit gold dust," etc. The material part of the complaint reads as follows: "Said defendants did, on the twenty-second day of April, 1865, make, execute, and deliver their certain writing obligatory whereby they promised to pay to plaintiffs the sum of one hundred dollars, upon the conditions therein mentioned, which said obligation is hereto attached, marked exhibit A, and made a part of this complaint. And the said plaintiffs aver that afterwards, to wit, on the twenty-third day of August, the said James Sloper was indicted by the grand jury impaneled in and by the district court of the third judicial district of Ada county in said territory of Idaho, and that after the presentment of said indictment in said court, the said James Sloper was duly called and came not." Whereupon it is averred that the recognizance was declared forfeited by the court.

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3. That the complaint does not state facts sufficient to constitute a cause of action.

The objection that the plaintiffs have not legal capacity to maintain an action is founded upon the fact that the abbreviations "U. S." occur in the title of the cause, namely, "The people of the U. S. of the territory of Idaho." We do not think this objection well taken. The abbreviations referred to are constantly used in statutes, in pleadings, and in almost all other classes of instruments or writings, and have a known, definite, and an unmistakable signification. They are constantly referred to as the initial letters of the term "United States," and are quite as frequently used as any abbreviations or initial letters in the language. By section 657 of the civil practice act, such abbreviations as are now commonly used in the English language are permitted to be used in all proceedings in the courts of justice in this territory.

But more than this. It is at most merely a technical objection, which does not affect the substantial merits of the action. Such errors, or defects, section 71 of the practice act declares shall be disregarded in all stages of the proceedings, and, further, no judgment shall be reversed or affected by such error or defect. The defendants were not nor could they be misled in the least by the use of those initial letters. They could not fail to understand that the people of the United States, etc., were plaintiffs, and, as they have capacity to sue, are the proper obligees to the undertaking. This objection can not be of any avail to the appellants.

The second error assigned, that the undertaking was not given in a case provided by statute, contains more merit. The recognizance recites that "whereas" at a certain preliminary examination had before a committing magistrate, one James Sloper, one of the obligors, was "deemed guilty of the offense of passing counterfeit gold dust," he was therefore required to give security for his appearance at the next term of the district court for the county. This is the only designation of an offense attempted by the undertaking.

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Simply passing counterfeit gold dust is not an offense under our penal code. The uttering must be accompanied with the knowledge that it is a false imitation of gold dust, and it must further have been the intention of the utterer to defraud the person receiving it. A party may pass counterfeit gold dust perfectly consistent with an honest purpose, if not done with a design to defraud. When a prisoner was compelled to enter into a recognizance to appear and answer to a charge of "playing a game of cards," the recognizance was held defective because simply "playing at a game of cards" was not a penal offense. (1 Archb. Crim. Pl. and Pr. 197.) The general rule, which is well settled, as stated by the same authority, is that a recognizance taken for a purpose not authorized by statute is void. (Id. 195.) The undertaking need not set out the offense charged with the same technical particularity required in an indictment, but it will be sufficient if the offense be substantially described that it may appear what charge the accused is held to answer. If, however, the recognizance undertake to recite a specific charge, as in the present case, a charge must be recited for which an indictment will lie, otherwise the recognizance will be void. And as the indictment in this case fails to recite an offense known to our penal code, although an attempt was made to do so, it is fatally defective in this respect, and therefore is not sufficient upon which to maintain an action.

The third error assigned, that the complaint does not disclose a cause of action, and therefore will not support a judgment, is also well taken. There is no averment for what offense the accused was indicted, but simply states that he was indicted. It does not appear by averment, or even implication, that the indictment was found for the offense under which the accused was held to appear and answer. This was necessary to render the sureties liable on their undertaking. They could only be held responsible, in default of his appearance in the event an indictment should be found for the particular offense set forth in their undertaking. (*Vide The People v. Fanny Smith et al.*, 3 Cal. 271; *The People v. Hunter and Davis*, 10 Id. 502.)

There is another defect in these proceedings, which we

Argument for Respondent.

will notice in this connection, and that is, the recognizance sued upon is joint, and not joint and several; hence, all the parties executing this instrument ought to have been made defendants, this being a suit for a breach of its conditions. This is not done. One of the parties whose name appears in the body of the instrument, and who subscribed to the same, is not made a defendant in this action. All persons jointly liable on a contract must be made defendants in an action on the contract. (*Vide* Tillinghast & Sherman's Pl. 468, 469; *Bloomington & Co. v. Du Rell & Co.*, ante, 33; *Lowe v. Turner et al.*, Id. 107.)

Judgment reversed.

DAVID HERRON, RESPONDENT, v. DANIEL M. JURY,
APPELLANT.

CONTINUANCE—DISCRETION.—An application for a continuance is one addressed to the sound and impartial discretion of the court, which should be supported by all the facts and circumstances appertaining to the case.

APPEAL from the third judicial district, Ada county.

Scaniker & Burmester, for the appellant:

Although the granting or refusing to continue a cause is said to rest in the discretion of the court, that discretion must be exercised in accordance with established rules, and the settled course of the court, for a court has no discretionary power in opposition to the settled principles of law and equity. (Hilliard on New Trials, secs. 9, 10, p. 9.) Besides there is a distinction between judicial and arbitrary discretion, and judicial discretion ought, and is, always exercised in such a manner as will best answer the ends of justice. (Hilliard on New Trials, secs. 12, 13, p. 10; 5 Wend. 114; 10 Id. 292; 18 Id. 534.)

W. A. George, for the respondent:

The court committed no error in overruling the motion. It was a matter within the discretion of the court, and the ruling will not be disturbed by this court unless it manifestly

appears that the court below was guilty of a gross abuse of discretion. (*Musgrove v. Perkins*, 9 Cal. 211; *Pilot Rock Creek Canal Co. v. Chapman*, 11 Id. 161; *Griffin v. Polhemus et al.*, 20 Id. 180.)

MCBRIDE, C. J., delivered the opinion of the court, CUMMINS, J., concurring.

This cause was tried in the district court, and judgment rendered for the plaintiff. Before going into the trial, the defendant filed his motion for a continuance on the ground of the absence of material testimony, supporting the motion by his affidavit setting forth the grounds, and it having been overruled the plaintiff took exceptions thereto. After the trial the plaintiff moved for a new trial, and upon this motion used the same affidavit as in the former one, alleging error in the first ruling; and it having been overruled, plaintiff took his exception and brings the case into this court, and assigns as error:

1. That the court below erred in refusing to grant the continuance asked for.

2. That the court below erred in denying the motion for a new trial.

The case is one of considerable importance in practice, and we desire to settle the point upon its merits. An application for a continuance is one addressed to the discretion of the court before which it is made. By this it is not meant an arbitrary discretion, controlled by caprice or whim, but a sound and impartial discretion, which should be supported by all the facts and circumstances appertaining to the case. It belongs to that class of applications which can not in the nature of things, be defined with such accuracy and certainty as is attainable in other cases; and hence, while there is some approximation to rules in matters of discretion, it is only an approximation, and nothing more; and hence, courts of review have uniformly refused to disturb a ruling on such questions unless it is shown that the discretion was abused and the ruling arbitrary.

In this case the affidavit is in the usual form, and if there was nothing in the circumstances surrounding the whole

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case to rebut the showing, it is presumed the application named would have been granted. We think, however, that the affidavit, while sufficiently broad in its affirmations to entitle it to be regarded favorably, was nevertheless weak in some of its particulars. It states that the defendant could not proceed to trial on account of the absence of Robinson; states the materiality of his testimony, and that the defendant expects to be able by the next term to obtain it. While this is all uncontroverted, and would seem to authorize a continuance, its form is much weakened by the admitted fact that the absent witness is in the Atlantic states somewhere; that although he has been written to, frequently at his supposititious residence, no response has ever been received, and that nothing like positive information of his whereabouts exists. To say, under such circumstances, that there was any reasonable probability of obtaining his testimony by another term would be trusting greatly to chance, and if a party's conscience, under these facts, were sufficiently elastic to swear to his expectations, it would only furnish an additional reason for scrutinizing the affidavit with greater vigilance. It is for the reason that an affidavit may comply formally with all the requirements of the statute, and yet when all the facts known to the judge are considered with it no proper showing is made, that a judge may still overrule it in the exercise of a sound discretion. If it were a matter of right, whenever an applicant brought himself within the rule by the terms of his affidavit, the court would be bound to grant his application. But it is a matter of sound discretion; the judge may and should consider not only the affidavit, but the whole case, and with a view to substantial justice, grant or deny the motion. No more delicate or responsible duty devolves upon judges than this, and their decisions are sustained, unless it appear that they are harsh and arbitrary.

I see nothing in this case to show that the denial was not in the exercise of a sound and wise discretion. As the errors assigned rest on this one point, the above is sufficient to dispose of the case.

Judgment affirmed.

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THE PEOPLE, RESPONDENTS, v. J. D. COZAD, APPELLANT.

CRIMINAL LAW—VERDICT—JUDGMENT.—On an indictment for an assault with intent to commit murder, when any less grade of offense is found by the jury, the verdict must show the character of the offense so found, and the judgment must not exceed that warranted by the verdict.

APPEAL from the second judicial district, Boise county.

H. L. Preston, for the appellant:

The verdict of the jury found the defendant guilty of an assault only, and recommended to the clemency of the court. That the maximum of imprisonment allowed to said offense was six months in the county jail (Stats., sec. 46, p. 444), whereas the court below inflicted by its judgment one year's imprisonment in the penitentiary.

J. J. May, district attorney, for the respondents.

MCBRIDE, C. J., delivered the opinion of the court, CUMMINS, J., concurring.

This is an appeal from the judgment of the district court of Boise county, sentencing the defendant to confinement in the territorial prison for one year. The defendant was indicted for the crime of an assault with an intent to commit murder by shooting one Thomas Foye. The defendant was tried, and a verdict of "guilty of assault only" returned by the jury. The court received the verdict, and thereupon sentenced the defendant as above. Exception was taken to this sentence, and no other facts connected with the case appear of record. In the absence of any statement or record of the proceedings beyond these, the case must be disposed of upon what appears. The presumption is that the jury were instructed, that if they found the defendant guilty of any less offense, necessarily included in the commission of the crime charged in the indictment, they might return him guilty of such offense. The fact that the jury did find him guilty of a lesser offense, and that the court received the verdict, presupposes such an instruction.

Points decided.

It is but fair to assume that the facts proven on the trial were of a character to show that the assault was of a character to constitute it a felony, viz., by the use of a deadly weapon. But neither the instructions nor the facts are of record, and the case standing here unsupported by the proofs upon which no doubt proceedings were based in the court below, must be decided from the record.

On an indictment for an assault with intent to commit murder, when any less grade of the offense is found by the jury, the verdict must show the whole character of the offense found. Such is the ruling in California, though upon what principle a jury are called upon to find all the facts required in an indictment in their verdict does not appear from those decisions. But we defer to these authorities as settling the rule. The indictment charged the defendant with an assault with intent to commit murder by shooting Thomas Foye. The jury find him guilty of the assault charged, but as the verdict does not show that the assault was with a deadly weapon, etc., the court below had no right to assume that they had so found, and pass sentence on that basis, whatever the facts may have been. The case of the *People v. Vanard*, 6 Cal. 562, *People v. Wilson*, 9 Id. 260, are adjudications directly on the point. The doctrine of these cases clearly shows that the court erred in passing sentence on defendant as for felony. He should have been sentenced for a misdemeanor only.

The order will be that the sentence of the court below be set aside and the case remanded, with an order to the court to affix the punishment in accordance with the provisions of section 46 of the act concerning crimes and punishments.

Judgment reversed.

S. D. CADY, RESPONDENT, v. S. P. SCANIKER,
APPELLANT.

DAMAGES ON APPEAL.—Affidavits can not be read in support of a motion for damages for failure to prosecute an appeal.

IDEM.—There is no question of the right of this court to allow damages in cases when appeals have been taken merely for delay, and no transcript ever called for.

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APPEAL from the third judicial district, Ada county. The facts appear in the opinion of the court.

Curtis & George for the motion. The only authorities referred to were the statutes, sec. 293, p. 142, and *Buckley & Morris v. Stebbins*, 2 Cal. 149.

T. Burmester, opposing the motion, cited *Osborn v. Hendrickson*, 6 Cal. 175.

CUMMINS, J., delivered the opinion of the court, McBRIDE, C. J., concurring.

On motion of respondent, based upon the certificate of the clerk of the court below, this cause was placed on the calendar in the early part of this term. The certificate of the clerk referred to shows that "judgment and decree of foreclosure and sale of mortgaged premises" was rendered by the district court on the seventeenth of May, 1867, the judgment and costs amounting to the sum of six hundred and thirty-one dollars and thirty-seven cents. On the twenty-ninth of May, the defendant filed a notice of appeal and an appeal bond, and duly served the notice on the respondent. The certificate further shows that no transcript has been called for or furnished to any one. On the third of August, 1867, the appellant paid off the judgment and the respondent entered satisfaction thereof on the clerk's docket.

Upon this state of facts, the respondent moves for ten per cent. damages for failure to prosecute the appeal, accompanying his motion with an affidavit to the effect that the appellant told the affiant he did not intend that the case should ever be taken to the supreme court, but that he simply wanted time, etc. Appellant objects to the filing of this affidavit. The objection to the filing of the affidavit will be sustained. To permit the practice contended for by the respondent would be in effect to allow questions of fact in the first instance to be inquired into in this court. This can not be done.

There is no question of our right to allow damages in cases of this character, under section 293 of the civil practice act. Parties have no right to call in aid the forms of

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law under the right to appeal to a superior court simply for the purpose of delaying the judgment creditor in the receipt of his money on his judgment. The right of appeal was given for an entirely different purpose. The fact that this judgment was paid off and no transcript ever called for by the appellant, is *prima facie* evidence of his intention merely to delay the execution of such judgment. But as the imposition of damages in cases on appeal is a proper subject for regulation by rule, and no rule of court having yet been established, we will for that reason deny the motion for damages. It might be deemed a hardship to inflict damages in any particular case in the absence of a rule on that subject.

Motion for damages denied, and appeal dismissed with costs.

CHRISTOPHER GIESKIE, RESPONDENT, v. CHARLES
A. LAWRENCE APPELLANT.

THE same order was made in this case as in that of *Cady v. Scaniker*, the motion being based upon a similar state of facts, except the judgment in this case had not been satisfied.

A. HAAS, APPELLANT, v. MISNER & LAMKIN, RE-
SPONDENTS.

REVENUE LAW—TAX—DEBT.—A tax levied or authorized by the territorial legislature, is a debt within the meaning of the act of congress authorizing the issue of legal tender treasury notes.

STATUTE.—A territorial statute requiring the payment of taxes in any other than lawful money, at par, is void as being in conflict with the act of congress, of February 25, 1862.

APPEAL from the third judicial district, Ada county.

Curtis & George, for the appellants:

It is evident from the reading of the act of congress, of February 25, 1862, that congress did not regard debts and taxes as one and the same thing, or as consisting of the same kind or character of demand, liability, or obligation,

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from the manner in which the two terms are used in that act, and we contend that the words "all debts, public or private," as contained in said act, were not only not intended by congress to include state or territorial taxes, but that by no legitimate construction of the terms themselves, and of their ordinary purport and meaning, can the word "debt" be understood or construed to mean taxes. (*Perry v. Washburn*, 20 Cal. 318.) Debts, whether public or private, and the obligation to pay taxes, have but few features in common. About the only one is to pay, perform or discharge, and that in the manner prescribed, whether by the terms of the contract, in case of debt, or by requirement of statute in case of taxes. There can be no debt, as we understand it, in the absence of a contract, either express or implied.

Seth Weldy, for the respondents:

Is the law enacted by the legislature of this territory, requiring all taxes due the territory to be paid in gold coin or its equivalent, in conflict with the act of congress of February 25, 1862? If so, then it is invalid and of no force or effect whatever. If there is such a conflict the law of congress must stand, and the territorial law must fall. (*McCulloch v. State of Maryland*, 4 Pet. 492.) The law of the territory in question conflicts with the law of congress, in that it seeks to enforce the payment of debts (taxes) in a different currency or money from that which is expressly made lawful by the supreme law of the land. The only question that arises in this case is whether the tax due a state or territory from its citizens are debts within the meaning of said act of congress. What is the definition of the word debt? In its most enlarged sense, it means any kind of just demand. (Bouv. Dict.) It also includes obligation, liability. Thus it will be seen that the word debt means obligation, liability. A debt, obligation, or liability may be incurred by express contract, or by implication and operation of law. A tax is an obligation or debt, raised by implication and operation of law. The payment of a tax may be enforced in the same manner as any ordinary liabil-

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ity by action of debt. Is there any question, then, that taxes due the state from its citizens do not fall within these definitions? A tax has been adjudicated to mean a debt due from the property-holder to the state, in two instances from the very same bench (California) which has more recently decided otherwise. (*People v. Seymour et al.*, 16 Cal. 332; *Moore v. Patch*, 12 Id. 265.)

CUMMINS, J., delivered the opinion of the court, KELLY, J., concurring, McBRIDE, C. J., dissenting.

This action was instituted by the assessor of Ada county in the court below for the purpose of enforcing the payment of the taxes levied for county, territorial and other purposes, assessed by the plaintiff against the defendants, who were residents and property-holders of said county. Payment was demanded at the time of making the assessment, in gold and silver coin, or their equivalent in gold dust, or in bullion, or in legal tender treasury notes at two per centum above their San Francisco market quotations, which was following the letter of the statute as enacted at the third session of the legislature.

There was also the further question submitted to the court below as to whether permanent and substantial improvements upon lands were to be considered for the purpose of taxation as real estate. This was answered in the affirmative, but is not now complained of as error, the only error assigned being, Are the legal tender notes issued in pursuance to the act of congress, dated February 25, 1862, a legal tender for the payment of taxes, notwithstanding an act of the territorial legislature requiring them to be paid as above stated?

This is a question of an important and grave character. It is one upon which the highest tribunals of some of our sister states and territories, and upon which some of the ablest jurists of our country have arrived at opposite conclusions. The answer to this inquiry must, no matter what it may be, directly affect every interest of the community. Hence, I approach its investigation with a due sense of the difficulties to be encountered, and the responsibilities to be

met. Another great embarrassment met with at every step of this investigation is the great dearth of authorities.

The constitutionality of the act of congress authorizing the issuance of these notes and making them a "legal tender in the payment of all debts, public and private," has been affirmed by too many of the tribunals of last resort in many of the states of this Union to be now considered an open question; and, in fact, I do not understand that it was seriously called in question by any of the counsel who appeared in the case at bar. The validity of the act itself, then, being beyond cavil, it remains only to determine whether the term "taxes," as used in our statutes, is comprehended within its terms when it is said that the notes issued in pursuance of the provisions of that act shall be a legal tender for all "debts, public and private." The act itself contains an enumeration of all the debts or obligations which are excepted from liability of payment by these notes. This enumeration excludes taxes, internal duties, excises, debts and demands due the general government, and includes duties on imports and the money to be raised with which to pay the interest upon bonds and notes, which shall be paid in coin; then follows the clause that these notes "shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States."

Of course this last quotation is the controlling clause in all cases of a character similar to the one now under examination. If it were admitted that taxes were debts in the common legal acceptance of the term, there would be but little difficulty in arriving at a correct conclusion. For all debts of whatever character are comprehended, except those specially excepted, and this is the paramount law of the land. That all laws of a state or territory are null and void which contravene, in any manner, either by engrafting limitations on or exceptions to the provisions, of an act of congress valid under the federal constitution, has been definitively settled by a course of judicial decision both by the courts of *dernier resort* in many of the states and by the supreme tribunal of the union, and that, too, by argument unanswerable. In the great case of *McCulloch v. State of*

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Maryland, this was one of the points expressly raised and discussed with great force and learning by the justly celebrated jurist, Chief Justice Marshall, and the opinion rendered by him was unanimously concurred in by the full bench.

Upon this, then, there can be no question that if any act of the territorial legislature contravenes, or is in opposition to any provision of an act of the federal legislature, which itself is not obnoxious to any provision or clause of the national constitution, or, in other words, is rightfully within the power of congress to pass, then such act of the local legislature must yield, must be declared void and inoperative. Are, then, the acts of the legislature of this territory which require taxes to be paid in gold coin, or its equivalent, in conflict with this act of congress? Do these acts in any manner militate against the provisions of that act? Are taxes, as understood by our laws, a "debt, public or private," within the meaning of either of these terms as used in the act of congress?

It has frequently been said, in considering this subject, that congress itself has recognized distinction between the terms "taxes" and "debt." This is argued from the fact that in the enumeration both terms occur. And unless there was a distinction made in the import of these terms, the law-makers would be chargeable with making a useless repetition. This argument savors more of assumption than of logical deduction from the language of the act. It is quite true that there are scarcely any two words in the language that have precisely the same shade of meaning or signification in all their uses or combinations. Much more is this true of these terms. The term "tax" may and does not in every sense or connection comprehend all the shades of meaning conveyed by the word "debt," but the latter may, and often does, in all correctness, include or convey the same idea we wish to express by the former, in at least its less technical sense, and many times much more. Hence, in this connection the word debt—and it certainly comprehends within its meaning all that is conveyed by the word "demand" used in the same connection—may include strictly

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all that is understood by the term "tax," and yet having a more extensive signification, or applying more usually to a different class of obligations, its use in the same sentence with the word "tax" is perfectly consistent with every rule of good composition. Therefore, I do not think a liberal interpretation of the language will warrant the conclusion often contended for, nor yet militate against an affirmative answer to the questions above propounded. The clause wherein the terms "taxes" and "debts" occur has reference solely to all those obligations and demands due the United States, and has no reference to or direct connection with the legal tender clause, and hence can not, as I deem it, have any particular bearing or influence upon the meaning of the term "debts," as it occurs subsequently. But, be this as it may, this question must, after all, be determined by the true meaning of the words "debts, public or private," as used in that act; and we are only permitted to go to the context in cases of doubtful construction.

It was ably argued by the counsel for the plaintiff that a tax was not a debt as understood by the legal acceptation of this term; that a tax is simply an obligation, a due or contribution levied upon the citizen or upon property for the purpose of raising the means necessary to carry on the political functions of the territorial organization; that it in no sense partakes of the nature of a debt, which is an obligation arising upon contract only, either express or implied. And in support of this position I am cited to the case of *Perry v. Washburn*, 20 Cal. 318. It is true that the court in that case did so decide. And while I entertain the highest appreciation and respect for the learned judges who compose that tribunal, I must dissent from the conclusions arrived at in that case as not being justified by sound principles of law. It is there said a tax is not a debt within the meaning of the act of congress making treasury notes lawful money. It is also said "a tax is a charge upon persons or property to raise money for public purposes." The reasons then offered for the correctness of this statement are that a "tax is not founded upon contract; it does not establish the relation of debtor and creditor between the

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taxpayer and the state; it does not draw interest; it is not the subject of attachment; and it is not liable to set-off."

Now, I submit in all candor that not one of these propositions or reasons, except the second which speaks of the relation of debtor and creditor, is a constituent part of a contract upon which to found a debt in its most technical sense. It is not essential to the validity of a contract that there should be a statutory provision making the indebtedness arising thereon subject to attachment, to set-off, or that it should draw interest. It is true that all or nearly all debts arising upon contracts entered into between individuals, firms or corporations, under our laws, are liable to be affected by these incidents, but this does not alter, change, or in the least affect the constituent elements of a contract as such. A state or territory can not be impleaded in a suit upon her indebtedness without express permission of law, and yet these obligations are none the less a debt. It is further stated that a tax owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the taxpayer. Most certainly his assent to this imposition or levy can as fairly and fully be presumed or implied on his entering into the community as one of its members, as his promise to pay the reasonable value of articles taken by him from the merchant's counter, when not a word is uttered about their price or about payment. When an individual enters a state or other organized government, he impliedly, at least, agrees to contribute his mite towards sharing its burdens and protecting its interests and organization.

Say the court of appeals of New York: "Money is property; taxation takes it for public use, and the taxpayer receives, or is supposed to receive, his just compensation in the protection which the government affords to his life, liberty, and property, and in the increase in value of his possessions by the use which the government makes of the money raised by taxation." (*People v. Mayor etc.*, 4 N. Y. 419.)

Hence the argument of that court (the supreme court of

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California) does not necessarily or logically conduct us to the conclusions drawn by it. The remainder of the decision upon this point merely assumes the argument or the proposition by saying that the term "tax," as used in statutes, is used in its legal and technical sense, and not in its more comprehensive and usual meaning.

The definition of the term debt, as given by Bouvier, "is a sum of money due by express and certain agreement." In this sense it could only arise upon contract, but it is not, by any means, used in this sense by statutes in all cases. I would further remark that this is its technical legal meaning. But, continues the same author, "in a less technical sense, as in the 'act to regulate arbitrations and proceedings in courts of justice,' in Pennsylvania, it means any claim for money," notwithstanding the supreme court of California say that when used in statutes it is with reference to its more technical meaning. "Again," says Bouvier, "it means any claim for money. But in a still more enlarged sense, it denotes any kind of a just demand." Webster says, in defining this term, that it is "that which is due from one person to another, whether money, goods or services; that which one person is bound to pay or perform to another."

Certainly these definitions are broad enough to comprehend the purpose and object of congress when they used the term, and that, too, without using it in its popular and most comprehensive meaning. Hence, I can not assent to the views of the court in the case of *Perry v. Washburn*. The object of taxation, as agreed by all, is to raise money to defray the necessary expenses of carrying on the territorial or state government, to lubricate the machinery of government, if the expression may be allowed. Money, as understood in this connection, has reference to the legal currency of the country. If, then, the object of taxation is to raise money only, that is, that medium of exchange which is by law made legal currency, then it follows that the legislature can not exact or require the payment of anything else. It is often asserted that the states, and the territories as well, are supreme in matters pertaining to their

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revenue system; otherwise it would be in the power of congress to impose such burdens or limitations in this respect as would most effectually destroy the state organization; that the revenue system is one of their most vital and important interests. This is all granted so far as the states are concerned, and for the purposes of the argument may be applied to the territories also. And yet it does not necessarily follow that they may prescribe or require the payment of taxes in anything they may deem proper, other than lawful money. A state may levy and collect taxes on any property or persons within her limits and subject to her jurisdiction and control. But this right, over which congress does not claim to exercise any authority unless it be incidentally, is simply the power to levy and collect taxes, and, as before observed, has no reference to the means by which this obligation or due, when ascertained, shall be discharged. This does not in the least militate against the right of the state or territory to receive in payment of taxes her certificates of indebtedness through her revenue officers; but she can not compel their payment in these evidences. If the converse of this proposition were true, it would certainly be within the power of the legislature, if actuated by a whim, or by sinister motives, to require their payment in eastern exchange or exchange on the Bank of England, or in any other paper which would be absolutely out of the reach of nine tenths of the taxpayers.

It will not do to say that their interest in the welfare of the state and their responsibility to their constituents will be sufficient safeguards against corrupt legislation of this or any other character. Suppose the powerful mining and other corporations doing business in this territory were to concentrate a heavy and combined moneyed influence upon a corrupt and venal legislature—an institution not entirely unknown to the history of our republic—and should procure the passage of an act making their certificates of stock lawful money in the payment of taxes, I think it would be difficult to find a lawyer who valued his legal opinion as worth anything, who would be willing to defend such an act as valid. This, of itself, is sufficient to present the glaring

absurdity of the proposition that a state or territory may exact the payment of her taxes in anything they may desire to, whether it be lawful currency or a worthless commodity. The territory enters into obligations to pay her officers certain and fixed salaries for their services; to purchase buildings, or to pay rent for the use of them; to pay for stationery, fuel, and other means indispensably necessary to carry on the territorial government. Are not these debts in the strictest sense of this term? If so, her creditors can not be compelled to receive anything but legal currency in discharge of these obligations. It seems to me, then, to be a very strong presumption, to say the least, that if a state or territory can not, any more than an individual, pay off her indebtedness in any currency or medium of exchange except that legalized by congress, that she can not use the power of taxation, which is the authority by which to provide the means to meet these obligations, for the purpose of exacting from the taxpayers anything which can not be used to the accomplishment of the end and design of taxation.

It was recently decided in the case of *The United States v. Washington Mills*, in the United States circuit court for the first circuit, that in addition to the remedy by distraint, assumpsit lies for the collection of taxes. Now, assumpsit is an action for the recovery of damages for the non-performance of a parol or simple contract. It is not sustainable unless there has been an express contract, or unless the law will imply a contract. Says Mr. Chitty in his excellent and comprehensive treatise on pleadings: "The breach of all parol or simple contracts, whether verbal or written, or express, or implied, or for the payment of money, or for the performance or omission of any other act, is remediable by action of assumpsit. The very foundation, that only upon which it can be based, is a promise, express, or implied. (*Vide Metcalf v. Robinson*, 2 McLean, 364.) To maintain this action, there must be a privity between the parties, but it may be a privity in fact, or in law. (*Frazer v. Carpenter*, Id. 237.)

Whatever may have been the particular circumstances out of which the case of the *United States v. Washington Mills*

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arose, there is no doubt but the decision was based, and that rightly, too, upon the liability of the party to pay the taxes levied against him, and that, too, in cases where the revenue system or other statutes make no provision in terms for any other proceeding for the collection of taxes than by distress. And in view of the fixed and universally admitted definition of that action, the relation of debtor and creditor must have existed between the taxpayer and the government, there must have been a promise, implied, at least, on the part of the defendant, otherwise that action could not have been maintained. Therefore, if this promise be true or correct, and it is supported by authority as well as principle, if assumpsit will lie in such cases, it is solely because the obligation to pay a tax levied against a citizen is a debt, and being so, there is no question of the right of such citizen to discharge this debt—this obligation, or imposition, as it is termed by the plaintiff—by the legal currency of the country.

This would be conclusive of the case at bar, but for the argument often urged that under our tax system a suit is not necessary to enforce collection—that the taxes are by statute made a lien upon the property of the delinquent, and that the tax collector may seize and sell such property to satisfy such demand without first obtaining a judgment in an action founded upon the legal liability to pay the taxes assessed. To enforce the payment of a debt by process of law it must be reduced to a judgment upon which an execution will issue, and which is the warrant of the ministerial officer for levying upon and selling property. But all this has reference to the remedy solely, and not to the character or nature of the original obligation itself. It can make no kind of difference with the nature of the demand, with its legal elements and the liability of parties to it, whether the remedy is by seizure and sale under a judgment first obtained, or simply upon the assessment as made by the proper officer. The obligations to discharge it are precisely the same in either case. And it necessarily follows that if in the one case it can be discharged by the legal currency of the country, whatever it may be, it may

equally as well be in the other. There is no logical escape from this conclusion.

Taxes under the territorial revenue system are a percentage levied or based upon the value of the property as fixed by the taxpayer and the assessor, and is expressed in dollars and cents, as required by law, except that *per capita* taxes are fixed at a definite sum for each individual liable for such imposition. And the tax itself, on property, is fixed at a certain sum in dollars, in proportion to the amount of property. In short, the leading, the sole idea is to obtain money. It is not the exercise of the power of levying and collecting a certain or definite proportion of the products of a man's labor, whether of the farm or of the manufactory, even if it be admitted that such a one exists with us, or of taking a given parcel of property, real or personal, for public purposes, for this would be the exercise of the power of eminent domain, and would require the return of just compensation.

Undoubtedly the want of sufficiently attending to the distinction between the right of eminent domain and the power of taxation has led many into error. Under the former power, property as distinguished from money, is taken, but by giving just compensation therefor, as in case of sale and purchase, while under the power of taxation money only is to be raised, as I have already remarked.

Neither is the military power of a state or political community the same as the taxing power. It is admitted that they both have a common origin; that they are attributes of sovereignty, and hence come from the people. But this is the only point of similarity, unless it is in the fact they are exercised by the duly authorized agents of the people, in their legislative capacity, for the maintenance of the welfare of the state. But it is confounding all distinctions in the use of terms, and in principles, to say that the military power, the taxing power, and the power of eminent domain, are the exercise of but one and the same authority in the government. Each has for its accomplishment certain ends, which are of a different character in each case. It would be a perversion of language to talk about levying men for military service, and then to say it was simply tax-

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ing the people—that it was merely using the taxing power. And, *vice versa*, an act to levy money—levying a tax—can not, in any proper sense of the term, be said to have been enacted by virtue of the military authority of the government. I grant that each of these powers, especially the military and taxing power, has but few limitations in the extent to which they may be used. But this does not argue that the authority is vested in the legislature of exacting anything from the people as taxes, whether it be money, goods, or chattels. Simply because the legislature may impose a tax to almost any extent, being limited almost solely by their own sense of the public demands, and because they may tax any property, persons, trades or professions, or because they may provide that the taxes when levied may be collected by warrant of distress, or by action, judgment, and execution—because, I repeat, they may do any one or all of these things, no more argues that they may, under pretense of taxing me, demand my horse or any other item of personal property aside from money, than it proves or argues that they may take my farm for public use, without just compensation.

In a recent case in the territory of Utah the collection of a certain school tax was perpetually enjoined because the legislature did not provide that the tax-collectors nor the treasurers should give bond for the faithful keeping and proper disbursing of the moneys so raised, nor did any law provide that those moneys should be paid out for any purpose. And yet I do not suppose that any one would for a moment question the correctness of the decision in that case. But this would have been all wrong if there is no limitation to the legislature in this matter, except in their own discretion. If the position be correct, based upon the assumption of the unlimited power of the legislature in matters of taxation, then it was beyond the reach of the judiciary, for it had been levied and directed to be collected, which left nothing to be done but to execute the law.

There must be and properly is some limit in the exercise of this right, which is found mainly in the objects to be attained. Besides, to say that the legislature can only raise money under the taxing power, is not in the least crippling

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the government or circumscribing it in any manner to its detriment, or to make it less effective in the accomplishment of the objects of its institution. With but rare exceptions this has been the extent to which it has been used since the organization of our republican forms of government in the states. And yet no serious inconvenience has ever been complained of or felt.

That the legislature can not discriminate between the different kinds of money made a legal tender, with reference to the material out of which the tangible representation is made, I think too frivolous to require more than a passing notice. In contemplation of law the representative of a dollar made of one of the metals is of no more value than that composed of paper. The intrinsic value of the material entering into the composition of the tangible representation of these values forms no part of their legal value as a medium of commerce. Plainly stated, a dollar in law is precisely the same whether composed of gold or of paper. I am not, however, unmindful of the fact that a contrary principle was laid down by the supreme court of California in the case of *Carpenter v. Atherton*, 25 Cal. 564. But, to use the language of the supreme court of the state of Nevada, in reference to the same case, "it is not from disinclination that I fail to approve the opinion of the learned court upon so grave a question as the one involved, but a sense of duty and responsibility to my convictions of what I believe the law really is, forces me to a conclusion opposite to that declared by that able and highly respectable tribunal." There is no real distinction in the liabilities of the parties, whether the promise be to pay in "gold coin" or to pay in "lawful money." And yet this is the basis of the entire argument of the court in that case. In either case it is simply, when stripped of all sophistry, a promise to pay the amount of the indebtedness in the lawful money of the country, unless the gold is treated as a commodity, which is not pretended by the court. As well might it be said that the court would be bound to enforce the specific performance of a contract which was entered into stipulating to pay in twenty dollar gold pieces or fifty dollar treasury notes, or in pieces of bills representing those values,

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and that the judgment could not be satisfied by pieces or bills of any other denomination. As unsound as this proposition appears upon the bare statement, it is but a legitimate deduction from the position assumed by the court.

I have, therefore, been conducted to the conclusion that it is not within the power of the legislature to require, nor in the officers of the law to enforce, the payment of taxes in anything but the legal currency as established by the various acts of congress. That the obligation to pay taxes may be discharged by the payment of any money recognized as a lawful tender for the payment of debts generally, without reference to the fact whether it be gold or silver coin or legal tender treasury notes. In other words, the obligation to pay taxes or the tax itself is a debt within the meaning of the act of congress of February 25, 1862, and hence all those acts or parts of acts of the legislature requiring the payment of taxes to be in gold or silver coin only, or its equivalent, are null and void so far that payment can be made, as already stated, in anything that is a legal tender in payment of debts.

Assessments should be based upon the true valuation of property, expressed in dollars and cents. The manner or mode of arriving at or ascertaining this must, of course, be left to the assessor and the taxpayer. These officers are amenable to the law for the faithful and proper performance of their duties, and if any person is aggrieved by acts not strictly within the line of their duty, the law affords the means of adequate redress. The assessor, not being the proper revenue officer to receive the taxes assessed on real estate, could not legally demand that portion of the defendants' taxes. These will be paid at the proper time to the collector of taxes levied on real estate, and not the assessor. The *per capita* and hospital taxes and the taxes assessed on the personal property of the defendants, were tendered in lawful money; and it was the duty of the assessor to have received them, if authorized to receive them at all, though they can not be demanded by him, the defendants owning real estate within this county.

The judgment is, therefore, affirmed.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT,
JANUARY TERM, 1868.

PRESENT:

HON. JOHN R. McBRIDE, CHIEF JUSTICE.
HON. MILTON KELLY, } JUSTICES.
HON. JOHN CUMMINS, }

J. M. BETTS, RESPONDENT, *v.* E. J. BUTLER ET AL.,
APPELLANTS.

VERDICT—PRACTICE—ADMISSIONS.—The omission of the jury to find by their verdict, the amount due, when that question is not in controversy, does not deprive the prevailing party of his right to a judgment for the sum admitted to be due by the pleadings.

VOID STATUTES—SPECIFIC CONTRACT ACT.—The territorial act approved December 4, 1864, commonly called the specific contract act, conflicts with the act of congress approved February 25, 1872, authorizing the issue of legal tender treasury notes, and is therefore void.

APPEAL—MODIFICATION OF JUDGMENT—JUDGMENT.—In cases on appeal where there is no issue of fact, this court will order the judgment of the court below corrected if erroneous in some particular matter only; or reverse it and order the proper judgment to be entered by the court below.

APPEAL from the second judicial district, Boise county.

Rosborough & Preston, for the appellants:

This action was for the recovery of money, and in such

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case it is an absolute and unqualified rule that “when a verdict is found for the plaintiff,” “the jury shall also find the amount of the recovery.” (Pr. Act, sec. 176, p. 114; Idaho Stats. 1863-4.) These prerequisites must both occur in order that the verdict may support a judgment. The jury found “for plaintiff,” but did not “also find the amount of the recovery.” Another error apparent from the judgment roll is that the judgment is in contravention of the act of congress of February 25, 1862, entitled “An act, etc., authorizing the issue of United States notes.” The last-named act is constitutional, and the supreme law of the land. (*Metropolitan Bank v. Van Dyke*, 27 N. Y. 401-545; *Rhodes v. Bronson*, 34 Id. 649.)

Ainslie & Foote and J. J. May, for the respondent:

It being sufficient to find for the plaintiff upon a plea of *nil debit*, in an action of debt, it only remains to be shown that debt is the proper action at common law upon a promissory note, and for which we refer to 1 Chitty Pl. 108, 109; *Wilmoth v. Crawford*, 10 Wend. 340.) The amount of the note having been admitted by the pleadings, there was no occasion for the assessment of the amount due. (*Buckley v. Marks*, 15 Abb. Pr. 454; *Buckley v. Lord et al.*, 24 How. Pr. 455.)

CUMMINS, J., delivered the opinion of the court, McBRIDE, C. J., and KELLY, J., concurring.

The plaintiff in his complaint demands judgment for the sum of four hundred and twenty dollars on a promissory note, of which he avers he is the owner and holder, and which it is declared was made and executed by the defendants. The only issue, as appears from the record presented to the jury, was fraud in the execution of the note; that it was executed by one having no authority, and under circumstances which were a fraud upon the rights of the defendants making this answer, namely, Taylor and Andrews.

It is admitted by the pleadings that there was such a note as that set out in the complaint, and there was no issue

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as to the amount due on such note, if valid for any purpose against these defendants. In short, the only issue made by the pleadings and tried before the jury upon which they were called to pass, was, Did the element of fraud enter into the execution of this note, or was there a want of power or authority in the defendant, Butler, to bind the firm of which he was one member and his co-defendants the other? In answer to this issue the jury return for their verdict that “we find in favor of the plaintiff;” that is, that there was no fraud in the execution of the note the subject, of this action. On this verdict the plaintiff made his motion for judgment for the amount demanded in the prayer of his complaint, which was granted by the court. From this the defendants who appeared in the action appeal, and assign as error that the court below had no authority to enter a judgment for four hundred and twenty dollars, or for any other definite sum, on this verdict; but contend that the verdict, in order to authorize such a judgment entry, should have found the amount due the plaintiff. This is assumed upon sections 175 and 176 of the civil practice act.

I cannot assent to the construction placed upon these sections by the appellants’ counsel; although it would probably be the better practice in such cases to require the jury to find the amount of the demand, yet this omission does not deprive the prevailing party of his right to have judgment for the sum due. It certainly could not have been the intention of the law-makers to absolutely require a jury to find in their verdict that a certain definite sum was due the plaintiff or the defendant, as the case might be, where there was no controversy as to the amount for which judgment should be given. If the court had instructed the jury to find the amount due, provided they found for the plaintiff on the issue of fraud, it could only have said to them, you will find the sum of four hundred and twenty dollars, for this is the amount admitted and about which there is no question. Hence, at most it is but matter of form, the omission of which will not vitiate the proceedings.

In the case of *Williams v. Willis*, 7 Abb. Pr. 90, the court says that “the facts that the work performed and

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materials furnished, to recover for which the action was brought, had been done and furnished by the plaintiff, and the amount he was entitled to receive was agreed upon and admitted, but the defendant denied that the contract therefor was made by her with the plaintiff, as alleged in the complaint. On that issue the jury found in favor of the plaintiff. That fact alone would not be sufficient to enable the court to pronounce judgment, even if the jury had answered "yes," instead of finding as they did; because it would not appear from such finding whether the work was done, or the materials furnished, or what amount the plaintiff was entitled to receive for his labor, if done, and materials, if furnished. The verdict was not, therefore, a special verdict. It may be regarded as a verdict in the nature of a special verdict as to one issue, or a special finding upon a particular issue. If any amendment of the verdict were necessary, the case of *Burhaus v. Tibbets*, 7 How. Pr. 21, illustrates the power of the court to permit it to be made; but I think it unnecessary. The verdict of the jury left nothing incomplete, and the court, taking the admitted facts, with the verdict of the jury, could have no hesitation as to the judgment to be rendered.

Under this authority there can be no question of the correctness of the judgment rendered in the case at bar. As already stated, the execution and ownership of the instrument upon which the action is based, as well as the amount due if a valid note, were all admitted by the pleadings, which admissions are as binding and effectual as if expressed in terms. These admitted facts, taken with the verdict, in the language of Judge Brady, left nothing incomplete, and the court could have but one thing to do, that of ordering judgment for the party entitled under such admissions and the verdict, and for the amount prayed for on the note, as was done by the court in this case.

Another error assigned by the appellants is that the judgment is for "clean Boise Basin gold dust at sixteen dollars per ounce." It is insisted that this is in contravention of the provisions of the act of congress of February 25, 1862, commonly called the legal tender act. This judgment was

Points decided.

entered under the authority of the specific contract act of the territorial legislature, approved December 3, 1864. But I have no hesitancy in pronouncing this latter act in direct conflict with the legislation of congress, which is the supreme law of the land. Judgments for money can only be entered for a specified amount in dollars and cents, without specifying any denomination or kind of money, and can be discharged by the lawful currency of the country, without reference to the fact whether it is gold, silver, or legal tender notes. (*Vide Milliken et al. v. Sloat*, 1 Nev. 573.) The judgment should be so far corrected as to make it a judgment for a specified amount in dollars and cents only. But it is not necessary to accomplish this purpose that the judgment should be reversed, for under the revisory power vested in this court it may be corrected by its mandate without directing a new trial. (*Curia v. Abadie et al.*, 25 Cal. 502.) In fact, there is no occasion for a new trial, as there is no question of fact to be determined. It is a mere error in the form of the judgment, which may be corrected on motion. It might and doubtless would have been corrected by the district court if a motion for that purpose had been made. In fact, this is the better course to pursue in such cases, as it many times will save the parties the expense and delay of prosecuting an appeal.

As already intimated, the judgment can not be reversed; hence, the costs can not be taxed against the respondents. But as a modification of the judgment is necessary, there will be no damages allowed.

Judgment is affirmed, with direction to the court below to correct the same as indicated in this opinion, with costs of appeal to the respondents.

THE PEOPLE, RESPONDENTS, v. JOHN C. PAGE, APPELLANT.

EVIDENCE—REBUTTING EVIDENCE.—Rebutting evidence is that which is given to explain, repel, counteract, or disprove testimony or facts given in evidence by the adverse party. It is a general rule that anything may be given as rebutting evidence, which is a direct reply to that introduced by the other side.

Statement of Facts.

COUNTERFEIT GOLD DUST—UTTERING OR ATTEMPTING TO UTTER.—The crime of uttering or attempting to utter counterfeit gold dust consists in the possession of a counterfeit or spurious article, knowing it to be such, and passing it, or attempting to pass it, with intent to defraud.

INSTRUCTIONS—INTENT TO DEFRAUD.—It was correct to instruct the jury that if they believed beyond a reasonable doubt that the defendant had, and passed, or attempted to pass, a debased or counterfeit article of gold dust, knowing its spurious character, the conclusion necessarily followed that he intended to defraud.

DEBASING GOLD DUST.—No definite amount or proportion of relative difference in the actual value of genuine gold dust, and that which is counterfeit is required. It is sufficient that it be debased, and that the party uttering it is cognizant of the fact, and passes it for a genuine article.

PRESUMPTION—CRIMINAL LAW.—The general rule in criminal cases is that every person is supposed to contemplate the result, and know the nature of his acts, so that when the acts which constitute the crime are established, the guilt is presumed. Guilty purpose is presumed from the commission of an unlawful or forbidden act.

APPEAL from the second judicial district, Boise county. The following are the instructions given to the jury by the court below:

“In this case, the prosecution must prove, to the satisfaction of the jury, that the defendant had in his possession an article of counterfeit or spurious gold dust; that he had it with intent to pass the same for a genuine article; that, if he tried to pass it on one Stewart, he was aware of its true character; that the attempt or act of passing it, if committed, was made or done in this county and territory. The law presumes, where the facts of the spurious character are established, and the passing or attempt to pass is made out conclusively, that the defendant knew its spurious character; and the passing or attempting to pass is conclusive evidence of the intent to defraud.

“Other evidence of the guilty knowledge and the intent to defraud may also be introduced by the prosecution, by showing that the defendant passed the same quality or any other quality of adulterated or spurious gold dust upon other parties or at other times. Such proof strengthens the conclusion of guilty knowledge in the particular instance when the indictment alleges the offense was committed. It is not necessary the prosecution should prove in addition to the facts that the defendant had the spurious or counter-

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feit dust in his possession, and the passing of it, that he knew its real character, by affirmative testimony. It is sufficient proof of his knowledge that it is shown to be a non-genuine article, and that being such he attempted to pass it.

“If the jury believe that he had such an article in his possession and passed it on the prosecuting witness, or attempted to pass it, that it was done in this county and territory, then the case of the prosecution is made out, and on all of these points the defendant is entitled to the benefit of any reasonable doubt which may arise in the minds of the jury as to his guilt. And if the jury is satisfied beyond a reasonable doubt that these facts are true, then the doctrine of reasonable doubt does not apply to any other part of the case. The law then presumes his guilt, unless the defendant establishes his innocence by a preponderance of testimony in his favor. Such is the rule in offenses of this character.

“A man who is a worker in these metals may show that he had the article in question, not to use or pass off as currency, but for some other or innocent purpose. A jeweler may use it in his trade; a chemist may experiment in his profession, and an innocent person may show his innocence of guilt by any proof that shows the jury that his possession of the spurious article and his use of it were for legitimate purposes. But unless he shall show such to be the fact by a preponderance of the testimony, he is not entitled to an acquittal, if the facts I have laid down are first established.

“As to the character of the gold dust in question, the jury must be satisfied that it is not genuine gold dust; that it is not the article which it purports to be. I do not mean by this that it shall be pure gold, but it shall be as pure of other metals as gold dust of like appearance. It should not carry a false face. Any false appearance or false representation of its value, if the said fact is known to the possessor, is evidence of his guilty purpose in passing it, if passed as genuine.

“Representations by the defendant of its being good gold dust need not be in words. It is a false representation of its character if he permits the man to whom he passes it to

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take it at a fictitious value, knowing that it is calculated to deceive him. And in this case if the jury believe that the dust in question was offered to the prosecuting witness, Stewart, to pay debt payable in gold dust, and it was not equal to what it imported to be, in value, then the defendant must show that he was ignorant of its debased character. And it does not matter that it was debased in value by being mixed with silver unless the defendant show that he was ignorant of its being so mixed.

“This ignorance would be shown if the defendant could establish that the dust in question was in its natural condition; that it was taken from the ground in that condition. This would form a strong presumption of the defendant's want of knowledge of its base character. Yet if a party should undertake to pass for good gold dust an article debased by silver, by artificial means, knowing it to be below the usual standard value of gold of like appearance and with intent to take advantage of the fact, to defraud the person to whom he passes it, he would be guilty of the crime charged in the indictment. If, therefore, the dust passed in this case is shown to have been mixed or adulterated with silver by artificial means, it is a fact which the defendant should explain to the satisfaction of the jury, showing his innocence, and the absence of such explanation would leave the guilt of the transaction proven. The attempt was made to show that the defendant had the tools and means in his possession to manufacture counterfeit dust. Possession of such means is a circumstance to be considered with his explanation of the use for which he had them. If the jury believe that an assay office on a quartz ledge is not unusual, or that if it was, that it was there used for honest and legitimate purposes, then that fact is sufficiently explained. Of this you may judge.

“The defendant has, by the statute of this territory, a right to testify in his own behalf, and his explanation of the transactions referred to in the testimony are to be considered by the jury, and such credit given to them as they deem them worthy of. The interest which a party accused of crime has in the event is a strong temptation to him to

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state such facts only as will exculpate him. But the credibility of the witness is a question wholly with the jury. They may believe or reject it as in their opinion the truth requires."

The jury returned a verdict of guilty, whereupon the defendant was sentenced to seven years' imprisonment at hard labor in the territorial prison. The other facts material to the case appear in the opinion of the court.

Samuel A. Merritt, for the appellant, assigned as error the charge of the court to the jury and cited, statutes of 1864, sec. 89, crimes and punishment act; 3. Greenl. Ev., sec. 111, 111 a; 2 Archb. Crim. Pr. and Pl. 917; 1. Greenl., sec. 14, latter part. Permitting the prosecution to call Koenisberger after the defendant had rested: 2. Bouv. Dict., title Rebutting.

J. J. May, district attorney for second district, for the people.

CUMMINS, J., delivered the opinion of the court, McBRIDE, C. J., and KELLY, J., concurring.

The defendant was indicted under the eighty-ninth section of the act concerning crimes and punishments, for having in his possession counterfeit gold dust with intent to pass the same for the purpose of defrauding one Sam Stewart, knowing such dust to be counterfeit. A trial and conviction was had, whereupon the defendant moved in arrest of judgment certain objections to the grand jury who found and presented the indictment, which motion being denied, a motion for a new trial was then made, which being also denied, an appeal is brought to this court.

The errors assigned, in the order I will proceed to discuss them, were: 1. In permitting the prosecution to call one Koenisberger as a witness after the defendant had rested his case; and, 2. The instructions of the court to the jury at the trial.

From the bill of exceptions it appears that under the direction of the court, one Cavalli, an assayer, made assays of three distinct parcels of what purported to be gold dust, coming from the hands of the prisoner, one lot passed by

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him on the prosecuting witness, Sam Stewart, another on one John Clarrisy, and the third found on his person at the time of his arrest, which assays Cavalli reported to the court. A few questions only were asked Cavalli while on the stand, by both the prosecution and the defendant, concerning the assay made of the dust alleged to have been passed by the prisoner on the prosecuting witness, and he was then dismissed. On the next day the defendant called Koenisberger to prove that the assay of the dust passed on the prosecutor, made by Cavalli, was incorrect, this last witness swearing that according to his assay it was worth much more than appeared from the former assay. After the defense was concluded, the prosecution asked leave to call Koenisberger to show that he had made an assay also from each of the other parcels of dust above referred to, for the purpose of rebutting the attempted impeachment of Cavalli's assays, which was allowed. To this defendant excepted and now complains of the same as error, claiming that it is not rebutting evidence, and hence was not admissible.

This evidence was rightly received by the court. The defendant called Koenisberger for the purpose of showing that the assays of Cavalli were erroneous. He inquires of the witness as to the one assay alone, made of the parcel of dust passed on the prosecutor. As to these assays they differ widely. Now, it is a very plausible and forcible inference to be drawn from this testimony that the other two assays made by Cavalli are, at least, subject to strong suspicion as to their correctness. And yet no inquiries could be made concerning them on the cross-examination of Koenisberger when first called by the defendant, as that would not have been responsive to the direct examination. Still there is a new character given to the evidence, and given by the defendant, by evidence it was not possible nor necessary for the people to have anticipated. As I have remarked, the testimony of Koenisberger, when first called, was not confined in its effects to the particular assay about which he was interrogated; but it extended with equal force to the other assays made by the same party. Now, rebutting evidence is defined to be that which is given to explain, repel,

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counteract or disprove facts given in evidence by the adverse party, and the evidence in this case comes clearly within this definition.

It is a general rule, says an eminent author, that anything may be given as rebutting evidence which is a direct reply to that produced on the other side. It was merely assumed by the counsel for the defendant that the evidence objected to was not rebutting in its character, but original. But this was simply assuming the whole argument, and weighs but lightly when endeavoring to arrive at a just determination of a mooted question. So far as his evidence affected the correctness of the two assays concerning which inquiry was made under objection, it was new and was called out by the adverse party. Hence, the testimony in question was properly admitted at the trial.

The second error assigned, that involving the correctness of the instructions given the jury, presents a question of more difficulty. The rule laid down in the charge goes quite as far as the doctrine of presumptions in criminal cases can safely be carried.

In giving an analysis of the offense charged, the court very properly said that it consisted of the possession of a counterfeit or spurious article of gold dust, the knowing it to be such, and the passing or attempting to pass it with the intent to defraud. The instruction was also undoubtedly correct that if the jury believed beyond a reasonable doubt that the defendant had and passed or attempted to pass a debased or counterfeit article of gold dust knowing its spurious character, the conclusion necessarily follows that he intended to defraud. It is said by Mr. Wharton in his treatise on American criminal law, that on the trial of an indictment for uttering a forged instrument, if the jury are satisfied that the prisoner uttered the instrument as true, meaning it to be taken as such, and that he knew it to be forged, they are bound to infer the intent to defraud. (Sec. 1456.) The intention to defraud is but one of the three principal elements of the crime imputed to the defendant, and it was not said by the court that the proof of certain circumstances was conclusive of the pris-

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oner's guilt, as seemed to be the understanding of counsel, but was simply conclusive of his intention to defraud. If it is admitted that the prisoner had a counterfeit article of gold dust in his possession, knowing it to be such, and passed or attempted to pass it as a genuine article, it is impossible to escape the conclusion that he intended to defraud, for that is the inevitable consequence of his act. Hence the language of the court that if the jury found the existence of the enumerated circumstances it was conclusive evidence of this intent; that is, the prisoner could not admit all the other facts, and then be heard in an attempt to rebut the presumption of fraudulent intention alone.

Allusion was also made on the argument to the fact that the genuine gold dust in circulation ranged in value from eight to sixteen dollars per ounce, and that in view of this fact, together with the evidence that one of the assays showed the dust passed on the prosecutor to be worth some eight dollars per ounce, the instructions in relation to what was "counterfeit gold dust" was prejudicial to the prisoner. I think not. No definite amount or proportion of relative difference in the actual value of genuine gold dust as it is found in its natural state and that which is counterfeit, as it is termed by the law, is required. It is sufficient that it be debased, even though it be to a very inconsiderable extent, and that the party uttering it is cognizant of this fact, and passes it for a genuine article, meaning it to be taken as such. If the party receiving be defrauded or might have been had the attempt to utter been successful, the offense is complete, the guilty knowledge being established. And to this extent only do the instructions go on this point. It is the object of the law to prevent the adulteration or alteration of the precious metals taken from our mines and entering largely into the circulating medium with us, by artificial means or agencies for the purpose of passing it for more than its real value, or than it might if left as it was when produced from the mine. Hence, all attempts at giving it an appearance by means of foreign substances, or in any manner changing its natural appear-

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ance, or manufacturing wholly or in part from base metals an article to resemble gold dust, as it is commonly denominated, with the intent of passing the same as genuine, as above stated, all these are acts of counterfeiting gold dust.

The last point of objection made to the charge to the jury, urged by the defendant, which it is necessary to examine, is the instruction that it was sufficient evidence of the prisoner's knowledge that the dust was a counterfeit or spurious article, to establish the fact that it was spurious or non-genuine, and that he attempted to or did pass the same. That is, the prosecution had made out a *prima facie* case, sufficient to put the prisoner on his proof, when these facts were established beyond all reasonable doubt; that on the establishment of these points the fact that he knew it to be such is presumed by the law, and unless this presumption be rebutted or in some manner explained away by the defendant, the jury are warranted in returning a verdict of guilty.

The general rule in the criminal law is that every person is supposed to contemplate the result and know the nature of his acts, so that when the acts which constitute the crime are established, the guilt is presumed. In murder, where the life as well as the liberty of the defendant is in jeopardy, where the homicide is established against the party accused, the malice and guilty purpose are implied. Although the law requires the joint operation of act and intention to constitute guilt, yet the intention is in the most heinous offenses which are followed by the most extreme penalties, implied by the act or acts committed.

Guilty purpose is presumed from the establishment of the facts of an unlawful or forbidden act. And this rule is not confined to any particular class of cases. It is the general rule of the criminal law of evidence. It is not even confined to those special statutory crimes which create offenses, and make their existence depend upon the guilty act and knowledge of the person charged.

In Massachusetts in the case of the *Commonwealth v. Ellwell*, 2 Metc. 190, a defendant was indicted under the statute for the crime of adultery. The offense consisted in unlaw-

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ful intercourse with Elizabeth R. Fosburgh, a married woman. There was no allegation of proof that the defendant knew that she was a married woman, and yet the court held that a conviction which was had under this indictment was good, and say that the "reasonable and practicable rule is that if a man shall willfully do an unlawful and criminal act, he must take upon himself all the legal and penal consequences of such act." They further add: "It is true that in the commission of all crimes, a guilty purpose, a criminal will and motive are implied. But in general such bad motive or criminal will and purpose are implied from the criminal act itself. But if a man do an act which would be otherwise criminal, through mistake or accident, or by force, or the compulsion of others, in which his own will and mind do not instigate him to the act, or concur in it, it is matter of defense to be averred and proved on his part, if it does not arise out of the circumstances of the case adduced on the part of the prosecution."

In the same state where, under the statute forbidding the publication of obscene books with intent to corrupt the public morals, a defendant was indicted for that offense without charging him with knowledge, Abbott, J., held that the indictment should have averred the guilty knowledge, but in passing upon the question what was proof of such knowledge, says: "Undoubtedly in general proof that a person sold obscene books would be sufficient *prima facie* evidence of knowledge, and the defendant would be required to overcome it." While he distinctly held that the indictment must contain the allegation of guilty knowledge, he as clearly laid down the rule that it would be established by the obscene publications themselves when produced. (*Vide* 1 Lead. Crim. Cas. 553, note.) An exception to this rule is found in its application to offenses enacted by statute against counterfeiting coin and forging bank notes, and the defendant insists upon extending the exception to the case now before the court.

It is not pretended that there is any precedent on the subject, or that there is any special reason showing that the rule as applied in the court below would be harsh or likely

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ever to lead to unjust consequences. But because of some supposed analogy between this and offenses for counterfeiting coin or forging instruments, the exception ought to be applied.

In Ohio where the possession of and secretly keeping instruments for counterfeiting coin or currency is made a felony by statute, the courts hold that the fact of secret possession is proof of guilty knowledge, and requires the party charged to explain and show his innocence. (Ohio Crim. L. 282.)

If a man desires to protect himself against the danger of passing a spurious article of gold dust he can always do so. It is not a lawful tender in discharge of pecuniary obligations. He is neither compelled to receive it nor to pay it out. The facility and certainty of ascertaining its actual value by assay or tests known to business men are everywhere available in this country. But in countries where coin and notes are the currency, any one is liable to be imposed on by a simulated article, with no adequate means of detecting its bad or vicious character. And because an innocent man might pass a counterfeit article of coin or paper currency with no purpose of crime, and to prevent a conviction in such cases, the courts have held that the guilty knowledge should not be inferred, but should be proved by other and additional testimony. The reason for the exception has no application in the passing of spurious dust. He can know by a test whether it is good or bad, and need not remain in ignorance unless willfully and willingly in a case of doubt. And a rule which would release him from the necessity of using such diligence as honesty requires, would be in the interest of crime instead of justice. The commercial wants of the territory do not by any means demand such an article as a circulating currency. And if dealt in as an article of commerce simply, with but little expense and caution, the most unskillful or least experienced need never be imposed upon or cheated.

As an objection to this proposition or rule of law, it was urged by the defendant's counsel that such a rule would convict all or nearly all of the people in the territory. This

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assumption may be admitted as a very strong statement of the case, but there certainly is very little argument in it. It may be true that a very large majority of those who have dealt or are dealing in gold dust, or receiving and paying it out as money in their ordinary business occupations, have at some time passed a counterfeit article, but it is equally true that it is very easy for an innocent party to establish his innocence beyond all question.

The ease, facility, and certainty with which the spurious article can be detected, as I have already remarked, when compared to the difficulty of detecting counterfeit coin or forged instruments, requires that innocent dealers, for their own protection against imposition, and in occasional instances, against the necessity of establishing their honesty of purpose in passing it, should at least exercise diligence and caution in receiving gold dust of any character or appearance whatever.

Hence, from as thorough and full an examination of this case as the circumstances and occasion will permit, I am fully persuaded that the instructions of the court below at the trial were correct, and that the rules of law governing cases under this statute, which I may here remark, is peculiar almost alone to our criminal code, was rightly apprehended and given in charge to the jury. The instructions throughout are succinct and lucid, and free from objection on all points upon which they treat.

The judgment, therefore, of the court below is affirmed.

THE PEOPLE, RESPONDENTS, v. MYER FRANK, APPELLANT.

CRIMINAL LAW—LARCENY.—In order to constitute the crime of larceny it is necessary that the property taken should have an owner, and that it be taken with felonious intent.

INDICTMENT—PROOF.—In an indictment for larceny it is necessary that the ownership of the property taken should be alleged, and such averment must be proved substantially as laid.

INDICTMENT—PROOF—VARIANCE.—If in an indictment for larceny the property is alleged to be that of W., but on the trial be proven to be that of W. & Co., consisting of W. and another person, the variance is fatal.

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APPEAL from the second judicial district, Boise county. The verdict of the jury was as follows: “We, the jury, find a verdict of guilty against the defendant for grand larceny, for stealing the property of M. Whiteman & Co., namely, gold specimens to the amount of sixty-five dollars, more or less; also gold coin to the amount of about ninety dollars, and two gold buckles valued at twelve or fifteen dollars, the property of M. Whiteman & Co., which was stolen June, 1867, at Centerville, Boise county, I. T.” The remaining facts are sufficiently stated in the opinion.

John C. Henley, for the appellant, cited the following authorities: 2 Archb. Crim. Pl. and Pr. 357–367; criminal practice act, sec. 406–409.

J. J. May, district attorney, for the people.

CUMMINS, J., delivered the opinion of the court, KELLY, J., concurring, McBRIDE, C. J., concurring in the judgment.

The defendant was indicted for grand larceny. On the trial the jury returned a special verdict, in which they described the property set out in the indictment, giving its value and stating that it was stolen by the defendant from, and that the property belonged to, “M. Whiteman & Co.,” but do not say that the — Whiteman named in the indictment is the same with M. Whiteman named in the verdict. Upon this the court below sentenced the defendant to imprisonment in the penitentiary.

The error assigned is that the indictment and verdict show a variance: that the indictment charges the property to belong to — Whiteman, while it was found on the proof to be the property of M. Whiteman & Co., an entirely different ownership.

This position is correct, as I conceive, upon principle as well as upon authority. The statute requires that to constitute the crime of larceny, the property of some person should have been taken with a felonious intent. The principle has always been laid down and strictly adhered to by courts in cases of this character, so far as my researches

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have gone, that the property stolen must be laid in the indictment in the general owner, or in some one having a special property therein, as a bailee. And this averment or statement must be proved substantially as laid. (*Commonwealth v. Blood*, 4 Gray, 33.)

In this case, as I have stated, it was averred that the property belonged to ——— Whiteman. On the proof it appeared to be the property of M. Whiteman and one Arnheim, doing business as partners, and that both were in and about the store where the goods were stolen.

In the case of *The Commonwealth v. Trimer et al.*, 1 Mass. 476, the indictment, as in the case now being considered, averred the goods stolen to belong to Joseph Haley. It appeared in evidence that these goods were the property of Haley and one Joshua Emery, who were partners in trade. Upon which Sedgwick, J., being present at that time only, Sewall, J., being also present, said if the case proceeds there must be an acquittal, as a conviction on this indictment would be no bar to another prosecution.

I think upon a careful scrutiny of the *Dodd case*, and also the case of *Dodge and Chilcott*, 2 Archb. Crim. Pl. and Pr. 366, they will be found not to declare a contrary rule or opinion, as has been intimated. In the former it was said that the goods stolen might have been laid as the property of Dodd, senior, for the very evident reason that he might be considered the bailee of the minor heirs, who inherited their ancestors' share of the common property. The minor children could not be said, in law, to be in possession of such property, as each one of the several partners of a business firm are of the entire property. Neither could they be said to be in possession of their moiety. So in the latter case. The property was stated in the indictment to belong to Dodge and Sarah Chilcott, widow. It was contended by the prisoner that the children of S. Chilcott, deceased, in respect to their interest under the statute of distributions, should have been named as joint proprietors. But the learned judge before whom the prisoner was tried held that the actual possession in B. Dodge and Sarah Chilcott, as owners, was sufficient. And the judges after-

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wards, upon the case being reserved for their consideration, held that the conviction was right. While it is true that the possession of Dodd in the one case, and of Dodge and Chilcott in the other, might inure to the benefit of the minor children, and was in fact for them, yet that possession was not their possession in the sense we use that term when speaking of partners. In the former cases the possession, which is sufficient to maintain the indictment, is exclusive, in a great measure, in those named, while in case of partners it is quite different, for in this case the possession of one is not exclusive, but the possession of the firm. Hence it must be admitted that there were very cogent and strong reasons for the rule, as well as a decided preponderance, at least, of authority, and, as I think, the conflict in authorities is more apparent than real. The property, then, should be laid as the property of all the general owners, or of a bailee or bailees, or in case of partners or other joint owners or owners in common, it should be stated either as the property of all, naming them, or as one of them named, and "another" or "others."

This would be sufficient upon which to determine the case in this court, were it not intimated that the ruling of the court below is justified by the two hundred and thirty-ninth section of the criminal practice act. This section reads as follows: "When an offense involves the commission or an attempt to commit private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, shall not be deemed material."

From this it is insisted that in case the offense is sufficiently set forth or described, so there is no mistaking the crime intended to be charged, an erroneous allegation as to the person injured, even though it should turn out to be an entirely different name, will not affect the proceedings. And the case of *The People v. McNealy*, 17 Cal. 332, is cited as favoring this view. So far as I can gather anything from this case cited, it presented a good indictment for an "assault with a deadly weapon with intent to inflict bodily injury," but gave the name of Sin Groon as the person in-

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jured, when it turned out in evidence that the name of such person was Lin Goon. Whereupon a *nolle prosequi* was entered. A new indictment having been found, a trial and conviction was had, and an appeal taken. The defendant, among other defenses, set up on the second trial a "former acquittal." On this defense the court excluded all evidence, which the supreme court held right, and in commenting on the section above quoted, says that "it is contended by the defendant that the effect of this section was to render the variance between the proof and the indictment immaterial; but we think that such is not the proper construction. It is only where there are other circumstances sufficient to identify the offense that the statute was intended to operate." This last sentence is somewhat ambiguous, as the court do not intimate in what such "other circumstances" might consist. But they further say: "There is no such circumstance in this case, and to hold that the defendant could have been convicted notwithstanding the variance, would be to hold that he might have been convicted of an offense different from that charged in the indictment."

The language of the court in the case cited applies with equal force to the case at bar. There is no objection to the indictment, but by the evidence it is ascertained that the prisoner did not steal the goods of — Whiteman, but is guilty of another offense altogether, namely, that of feloniously taking the property of M. Whiteman & Co.

In the case of McNeally, the indictment being good so far as it charged a public offense and going no further, as in this case, the statute did not apply, for the reason that there were none of those circumstances in respect to which it might be defective, and yet be sufficient to support a sentence. To charge the offense of larceny the felonious taking and carrying away must not only be averred, but that the goods were the property of some person named. Then the plain reading of the statute is, where an offense involves the commission or an attempt to commit private injury, as almost every felony does, and the offense is described with sufficient certainty, except as to the private injury, to iden-

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tify the act, an erroneous allegation as to the person injured will not be material; still the person injured must be named, or the failure will be fatal. The court plainly say that the statute has no application to cases of variance. The statute does not, as I conceive, dispense with the necessity of naming the person injured, but only declares that where the offense is sufficiently described in other respects than in describing the private injury, an erroneous allegation as to the person injured will not affect the proceedings, although the proper person must be named. If there is no attempt, as in this case, to describe the private injury which may have been involved, further than it is necessarily included in the statement of the public offense charged, then a case for the application of the statute is not presented. And hence there is much force in the position of the counsel for the prisoner that this statute applies more frequently to that class of offenses made so by statute, which were mere private injuries at common law. For it is a general rule that indictments in such cases are required to be more particular in the statements of facts constituting the offense, in order to bring them clearly within the statute.

Therefore I conclude that the statute was not designed nor does it do away with the effect of a variance in this respect, and in this case it was necessary for the prosecutor to prove the averment of ownership substantially as laid. But not having done this the variance is fatal.

Judgment reversed.

Opinion by McBRIDE, C. J., concurring in the judgment.

I do dissent from the judgment rendered in this case. I only desire to say that in my opinion section 239 of the criminal practice act is narrowed in its construction by my associates beyond what is warranted. The statute provides that where there are other circumstances sufficient to identify the offense charged, that an error as to the person injured shall not be material. As I do not propose to claim that there are sufficient other circumstances in this case to warrant us in saying that the offense described by the special verdict is the same charged in the indictment, it is not ma-

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terial to go further than to say that I think the statute means that there may be cases so identified by other facts than those referring to the person injured, that notwithstanding it turns out to be another person, the defendant may be convicted. What those facts might be in advance it would be too difficult to define. But if defendant is charged with assaulting A and the act, the manner of it, the instrument, the place where, and the time when, are so described that where the proof shows that the act charged was in reality committed on B, and not on A, then, notwithstanding the variance, he may be convicted. In such case the statute will apply.

With this expression of my views I concur in the judgment.

THE PEOPLE, RESPONDENTS, v. N. J. NASH, APPELLANT.

PROCESS DEFINED.—The word process, as used in the statute, is equivalent in meaning to the sheriff's official authority.

CRIMINAL LAW—PLEADING—DEMURRER. — The objection that an indictment charges two offenses must be taken by demurrer.

IDEM.—An objection to an indictment, that it sets forth no sufficient charge of a criminal offense, should not be allowed to prevail in a doubtful case, but only when the insufficiency is so palpable as clearly to satisfy the mind of the judge that a verdict thereon would not authorize a judgment.

DEGREE OF PROOF.—It is not necessary for the prosecution to exclude every possible defense in order to secure a conviction.

OBSTRUCTING OFFICER—NOTICE.—While the statute requires an officer to inform a party upon whom he is about to serve criminal process of his office and purpose, this need not be done when the officer is well known to such person.

APPEAL from the second judicial district, Boise county.

Rosborough & Preston, for the appellants:

An indictment under a statute must state all such facts and circumstances as constitute the statutory offense, so as to bring the party indicted clearly within the provisions of the statute. (*People v. Cohn*, 8 Cal. 43; *Commonwealth v. Brown*, 8 Mass. 65; *Commonwealth v. Phillips*, 16 Pick. 213; *People v. Muckler*, 9 Cal. 44; *People v. Saviers*, 14 Id. 30;

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People v. Allen, 5 Denio, 76; *People v. Taylor*, 3 Id. 91.) The charge, as laid in the indictment, that the officer was in the "discharge of his duty as such sheriff," is too general. (1 Archb. Crim. Pr. and Pl. 291; Id. 146.) The indictment should show what duty the sheriff was performing, so that the court may see that it was official duty. (2 Id. 290 et seq.)

J. J. May, district attorney, for the people.

MCBRIDE, C. J., delivered the opinion of the court, CUMMINS, J., concurring, KELLY, J., dissenting.

The defendant was indicted for resisting an officer while in the discharge of his official duty, by assaulting him with a pistol. On arraignment in the lower court the defendant demurred to the indictment on the ground that it did not allege "that Crutcher (the officer) was attempting to serve any process, or that he had any process to serve at the time," etc. This the court overruled and defendant excepted, and now assigns said ruling as error. The defendant then entered the plea of not guilty, and on the trial was convicted of the offense alleged in the indictment. On the trial the court was asked to instruct the jury as to several questions suggested by defendant; some of these instructions were refused and others given, as appears by the record, to which exceptions were taken. After the verdict the defendant moved in arrest of judgment, and though several grounds are assigned, we can only consider one of them, because under the provisions of section 293 objections which are grounds of demurrer can only be taken advantage of on demurrer, except two, viz., want of jurisdiction in the court, and that the facts stated do not constitute a public offense. Inasmuch as the defendant did not urge on demurrer the objection that the indictment charged more than one offense, and that it does not conform to the requirements of the two hundred and thirty-third and fourth sections of the criminal practice act, she is precluded from raising them afterwards, except the objection that the indictment does not show facts constituting a public offense. (Crim. Pr. Act, sec. 293.)

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The motion in arrest of judgment was denied, as also a motion for a new trial based on the exceptions, and on appeal all the objections are before us for review. We have before us, therefore, three propositions:

1. The sufficiency of the demurrer.
2. Was there sufficient in the indictment to show that an offense had been committed?
3. Was the motion for new trial properly denied?

As to the demurrer, though the statute provides five distinct grounds of demurrer the defendant urged but one, and it is not a little difficult to say whether that was intended to be under the second or fourth subdivision of the section (285) which specifies the various causes of demurrer. The language of the demurrer is that the indictment "does not set forth facts sufficient to constitute the crime alleged therein, in this, that it does not appear that said James I. Crutcher was attempting to serve any process at the time of the alleged assault, or that he had any process to serve," etc. I take it that the defendant meant by this demurrer to except to the sufficiency of the facts charged to constitute the offense named in the indictment. He did not mean to say that there was no such public offense, but only that the statement of it was insufficient in the particular suggestions, viz., that the officer assaulted was armed with such process as to make an assault upon him a crime.

The question then is, what kind of process is it necessary for an officer to have in order to make resistance to him an offense? Does the law require that he should be armed with a written process from some court, in order that the offense of resistance to the officer could exist? Is there any unwritten process, any power inherent in the officer which is equivalent to written process from some court, which requires of him the performance of official duties, and which protects him while in their performance? The answer is found in the statute. All of the official duties of the sheriff are there prescribed and enjoined, and they are, briefly, to serve the written commands of the various courts in his county, to obey the directions of such courts as their ministerial officer, to collect certain taxes, and perform

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various duties of a general character prescribed by the statutes. All these obligations imposed by law are comprehended and clearly described by the term "official duties." The statute punishes the offense of resisting the sheriff while he is serving or attempting to serve process. Does this mean that he shall be protected while he is serving written process only, and that there can be no offense in other cases of resistance. The defendant contends that this is the law, but we think erroneously. I think that the word process, as found in the statute, is used in its extended or unlimited sense, and is equivalent to the sheriff's official authority. It would be a strange law that would require an officer under the sanction of an oath and the obligations of an official bond, to perform certain prescribed duties without any written process whatever, and yet leave him with no protection other than that which is common to every citizen. In many instances, when the most crimes are committed, and the most offenders are to be apprehended, and the greatest risk and danger are to be incurred, no time can be given to the duty of getting out process. Is an officer to run the hazard of losing his life while executing his duty under such inconsistencies, and the criminal to be left to resist without any fear of punishment except such as would be meted out to him if it were an encounter with a private individual? Such a construction of the law is unreasonable and utterly inconsistent with the prevailing principle which everywhere in our jurisprudence makes duty on the one hand and protection on the other co-equal and co-extensive. Such a construction of the law is founded on the letter which killeth, not the spirit which giveth life; and I can not assent to it. I can not agree to a construction of the statute which obliges an honest officer in this land of violence to take his life in his hands, and go out in the discharge of his duties and furnishes no shield for his faithfulness while thus engaged, and whenever he is resisted, while in the discharge of his duty, the person so offending can not plead in palliation of his violence that the officer was without written process.

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He may show that he was acting without authority, but the form of the authority is nothing to him.

That this is correct is evident from the statute itself. The language in section 100, crimes and punishments, is: "Any person who shall willfully obstruct, resist, or oppose any sheriff, etc., in serving or attempting to serve any law process, or order of any court, judge, justice of the peace, or any other legal process whatever. Strictly speaking, process," as its etymology shows, is something issuing out of, or from a court or judge, and if the statute had stopped there some force would be given to the defendant's construction of the term, but in order to cover any conceivable cause of official duty the legislature adds "or any other legal process whatever." That this means all cases when the sheriff is engaged in duty enjoined by law is clear or it would be a useless sentence. It was to carry out the principle that duty to perform and protection in that duty should go hand in hand.

This being the case, it follows that no matter whether the officer was serving a warrant of arrest, civil process for attachment of goods, or distraining for taxes due, the defendant in resisting him, while discharging his official duty, was resisting him while serving process and would be guilty under the statute. The crime would be as great in civil as in criminal cases, when he had a warrant as when he had none, and no less a crime in the latter than the former. The question would be whether he was in the performance of some duty either ordered by a court or enjoined by law, and if defendant knew that he was so engaged, the kind of process could be a matter of no consequence. These positions as to what is legal process are affirmed in the case of the *People v. Nevins*, 2 Hill, 166-9, by Judge Cowan in a decision where the whole question is fully and elaborately discussed, and fully sustains all that I claim for the term process in this case.

2. The motion in arrest of judgment claims; 1. That the indictment charges more than one offense. As this objection was not urged by the demurrer it was too late to take it after trial (see sec. 293); 2. That the indictment

does not substantially conform to sections 233 and 234 of the criminal practice act. For the reason assigned above we can not consider this objection, except so much of it as is found in the third allegation of the motion and which is, 3. That the facts stated do not constitute a public offense. This I now proceed to consider.

In the case of the *Commonwealth v. Eastman*, 1 Cush. 214, the court say that such a motion (to quash because the indictment sets forth no sufficient charge of any criminal offense) "should not be allowed to prevail in a doubtful case, but only when the insufficiency of the indictment is so palpable as clearly to satisfy the presiding judge that a verdict thereon would not authorize a judgment against the defendant." This is stating the doctrine very strongly, but it shows how careful, even in a state where the greatest strictness prevails, the courts are in requiring a substantial legal defect instead of a mere technical weakness, to defeat an indictment. With some strictness ought the rule to be applied after a verdict has been had. It is true that if it appears that all the facts charged are admitted there would still be no crime, such an indictment is worthless, and even after verdict should be set aside; but if an indictment contains all the elements of crime in its charges, let them be ever so defectively stated, and the defendant do not demur and stand upon the defect, but goes to trial and a verdict is found against him, the presumption is that the proof must have established all that was necessary to convict, and he can not be heard to impeach the weakness of the charge. The charge in this case is that the defendant was guilty of the crime of resisting an officer.

This is an offense at common law and under our statute. Blackstone says: "Obstructing lawful process is at all times an offense of a very high and presumptuous nature, but more particularly so when it is an obstruction of an arrest upon criminal process. And in civil cases resistance will justify an officer in proceeding to the last extremity. So that in all cases, civil or criminal, when persons having authority to arrest or imprison are resisted in so doing while using the proper means for that purpose, they may

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repel force with force, and need not give back." (Archb. 787.) Also, p. 852: Officers of justice while in the execution of their offices are under the peculiar protection of the law, and killing them whilst so doing is murder. Note, also, sheriffs, constables, watchman, etc., while in the due execution of their duties, are under the peculiar protection of the law—a protection founded in wisdom and equity—for without it the public tranquillity can not be maintained nor private property secured; nor, in the ordinary course of things, will offenders of any kind be amenable to justice. Again, in the text, same page, the author says: "Every person acting in lieu of peace officers, whether commanded to do so or not, enjoys the same protection as the officers themselves." He also adds, p. 856: "Also in civil suits the officer who executes the process of the courts is entitled to the same protection as an officer of justice in criminal cases."

These citations sufficiently establish the position that resistance to an officer in the execution of his duties is an offense punishable both at common law and by statute. When, therefore, a charge is made that the defendant resisted the officer while in the discharge of his official duty by assaulting him with a pistol as in this case, there can be no question that it presents a statement which, if true, is a crime, and the question is whether the words of the charge bring the case within the provisions of section 100, of the act of crimes and punishments. If I am correct that when the officer is performing any duty in administering the civil or criminal law which is enjoined upon him, and I think the authorities quoted establish this, then the allegation in this indictment, though not in the language of the statute, is embraced by it. The phrase, while in the discharge of official duty, is more general than the one found in the statute, but the latter is clearly within its meaning. If the defendant had objected by demurrer that it was too general; that it did not clearly show what duty the officer was performing; that it was not sufficiently explicit in setting out the circumstances of the offense—I think the objection would have been good. But, having waived a fuller statement of the facts, he can not urge it now. The right to require the par-

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ticulars of the offense, such as whether the officer was there to arrest the defendant, to search the premises for some other offender, or to attach her goods—these are facts which she might require for the purpose of knowing precisely the offense, by identifying it by its attendant circumstances; but to allow a party to sleep on these rights through a trial, when they must have been proven in order to a conviction, and then deny their existence because they did not as fully show upon the indictment as they might have been required to be, is simply to trifle with forms. Even if it were not punishable under the statute for resisting an officer, it would clearly be at common law, as I have shown by the citation from authority; and admitting that the indictment is defective for that purpose, and that no conviction could be had for resisting an officer because of defective statement of the officer's duty and authority, the charge for assault on the sheriff is good in every particular. The last objection that the indictment contains no offense in the motion for arrest of judgment is consequently not sustained, and was properly overruled. The next point presented as showing ground for reversal is error of the court below in its instructions to the jury.

The first error relied upon is the instruction that the presumption of law was in favor of the rightfulness of the sheriff's proceedings in entering the defendant's house to make the arrest and search, and if the circumstances which would legally authorize an arrest and search without warrant did not exist, it devolved on the defendant to show their non-existence. This instruction is based on the familiar rule that when the unlawful act which would constitute the offense is proven, anything that goes to show innocence comes from the accused. It is not for a prosecution to exclude any possible defense in order to a conviction. In this case Crutcher, the sheriff, who was assaulted, testified that he believed Watson was guilty of a felony, that he was informed he was in defendant's house, and went there to arrest him. This would authorize the issuance of a warrant, and if the facts as stated were believed by him their absolute truth was unimportant. Watson may have been

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entirely innocent—he may not have been about defendant's house. Still that would not justify an assault upon an officer who believed the contrary, nor relieve him from the duty of making the arrest wherever found. When the sheriff believed a felony had been committed by Watson, that he was concealed in defendant's house, he not only was authorized to arrest but it was his duty to do so, with or without warrant. If Watson, though falsely accused, could, if found, have been compelled to submit to arrest, and there is no doubt of it, could the defendant resist the sheriff in attempting his arrest and not be guilty? To show innocence, the defendant should show that the officer was proceeding without any cause to suspect—in other words, acting in bad faith. This is the only check on his discretion—bad faith or without probable cause.

The second objection to the instructions is that the jury was instructed by the court below, "that if the defendant knew Crutcher was the sheriff it was not necessary for him to announce his office" when he came to make the arrest at the time of the resistance. The statute requires that an officer should inform a party of his office and his purpose when he is in the execution of process, but this becomes an idle formality when the officer is known. The sheriff in this case swears that he was known to the defendant as sheriff, and that he did inform her of his object. The law does not require a useless parade of official pedigree to a party already knowing it. Following this reasonable rule Mr. Archbold says (857): "The officer must give notice to the party of his authority to bring himself within the protection of the law; unless indeed the party already knows it."

The motion for new trial, therefore, on these alleged errors in the instructions, and others which have been noticed in passing on the motion in arrest of judgment, and the demurrer was, I think, rightly denied.

Judgment affirmed.

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D. F. GOODELL, INSOLVENT, v. HIS CREDITORS.

INSOLVENCY PETITION.—A petition in insolvency should show the date of the debts, as those which existed prior to the passage of the insolvent debtors act, are not affected by it.

ADJOURNED into this court from the second judicial district, Boise county.

W. R. Keithly, for the petitioner.

Rosborough & Preston, for the creditors.

CUMMINS, J., delivered the opinion of the court, McBRIDE, C. J., and KELLY, J., concurring.

The petitioner, Goodell, filed his petition July 9, 1866, seeking the benefit of the insolvent debtor's act.

To this petition two of his creditors interpose a demurrer upon the ground that such petition does not set forth or show the nature of the debts from which the petitioner seeks to be discharged, nor the time when they were contracted, whether before or subsequent to the passage of the act referred to. The cause was certified into this court for trial upon this demurrer by the district court of the second district.

The petition contains a statement of but a few of the facts necessary to entitle a debtor to a discharge under the territorial insolvent law. It does not show when a single one of the debts sought to be barred by this proceeding was contracted. This is absolutely necessary, for debts which existed at the time of the passage of this act can not be affected by any proceedings under it. A different rule would violate the constitutional inhibition against impairing the obligation of contracts.

It is firmly established by judicial decision that the states—and I will not now discuss the question whether there is any denial to or want of the same power in the territories—still retain the power to pass insolvent and bankrupt laws. But this power is not unlimited, as it was before the adoption of the federal constitution. It does not extend to the passing of insolvent or bankrupt acts which shall dis-

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charge the obligation of antecedent contracts. It can discharge such contracts only as are made or entered into subsequently to the passage of such acts. Therefore, a discharge under these statutes is no bar to an action on a contract existing at the time when the act went into operation. (2 Kent, 503.) And hence, in passing the territorial act under which this proceeding is instituted, it was attempted, at least, to comply with this fundamental law, as will be seen by reference to section 24, although it is somewhat ambiguous.

For the reason, then, that antecedent contracts can not be discharged, it becomes necessary in all cases that the petition should show the date of each debt. The omission of this, as in this case, is a failure to state material facts, without which an adjudication can not be had.

The demurrer is sustained, the cause remanded back, with leave to the petitioner to amend his petition if warranted by the facts.

O. H. PURDY, APPELLANT, v. J. C. STEEL ET AL.,
RESPONDENTS.

PRACTICE—EXCEPTIONS—ASSIGNMENT OF ERRORS—WAIVER.—All exceptions taken in the court below will be treated as waived, unless the matters so excepted to are assigned as error in this court.

REVIEW—JUDGMENT ROLL.—In cases where no motion for a new trial was made in the court below, or where there is no statement properly made on such motion, the appellate court will only examine the judgment roll, and if this be regular, the judgment will be affirmed.

APPEAL from the third judicial district, Owyhee county.

No appearance for the appellant.

Scaniker & Burmester, for the respondents.

CUMMINS, J., delivered the opinion of the court, McBRIDE, C. J., and KELLY, J., concurring.

The plaintiff, in his bill, seeks to enjoin the defendants from trespassing upon a certain mining claim to which he avers title in himself, and that he was in possession of the

same at the time of suit brought. It is also averred that the defendants frequently enter upon said claim and work and remove therefrom valuable quartz rock, and they also set up some interest or estate in the same in themselves, adversely to that of the plaintiff.

A jury having been demanded, some five distinct issues were framed under the direction of the court, upon which evidence was submitted to such jury, who, after due deliberation, returned a special verdict answering each issue separately submitted to them, on which special verdict the court entered judgment or a decree for the defendants. The plaintiff moved to set aside this verdict as being contrary to law and the evidence, but the court very properly overruled the motion, to which exception was taken. There is, however, no motion for a new trial, or any other step taken by the plaintiff, except to move the court to set aside the verdict as already stated. Following the record of these proceedings are some forty-six pages of manuscript, purporting to be a "statement of case on appeal."

There were several exceptions taken by the parties during the progress of the trial, but there is no assignment of errors in this court. This brings the case within the rule heretofore laid down, namely, that we would treat all exceptions taken in the court below as waived unless they were assigned as errors in this court. (*People v. Page*, *Lamkin v. Sterling*, *Fierbaugh et al. v. Masterson*, *ante.*) Such is also the rule laid down in the supreme court of California, to the practice in which court ours is very analogous. (*Brown v. Tolles*, 7 Cal. 398; *Barrett v. Tewksbury*, 15 Id. 354; *Sayre v. Smith*, 11 Id. 129.)

It is to be inferred simply from the record that the appellant intended to rely on the motion to set aside the verdict. But the proper determination of this motion involves the examination of facts, which can only be done upon a motion for a new trial. All we can do where there is no motion for a new trial, or statement properly made on such motion, is to look into the judgment roll itself (*Chaney v. Silverthorn*, 9 Cal. 67), and if this be regular, the judgment will be affirmed.

Argument for Appellant.

There was a complaint regularly filed. The demurrer to the same was overruled by the court with leave to the defendants to answer, which they did in due time. The order overruling the demurrer can not be assigned as error in this court, as the respondents finally obtained judgment on the merits at the trial, and hence it was no longer a matter by which they could be aggrieved. All the subsequent proceedings, so far as appears on the face of the judgment roll, were regular, and the decree properly rendered in favor of the defendants below.

Judgment affirmed.

THE PEOPLE, RESPONDENTS, v. EDWARD STOCK,
APPELLANT.

IMPEACHMENT—WITNESS.—The rule for the introduction of evidence to contradict a witness is as follows: If the fact to which the contradiction applies is material to the issue, he may be contradicted; but when it is immaterial, and not within the issue, contradictory evidence can not be introduced.

EVIDENCE—REPUTATION OF DECEASED.—The rule is well settled that the reputation of the deceased can not be given in evidence, unless the circumstances of the case raise a doubt whether the defendant acted in self-defense.

JURY—DISCHARGING JURY.—There is no particular length of time prescribed by law for keeping a jury together. The time is entirely within the discretion of the court.

APPEAL from the second judicial district, Boise county. The defendant was convicted of murder in the first degree. On the trial he offered testimony to contradict one of the witnesses for the people, which was excluded by the court, as was also testimony offered to show that the deceased was a man of a violent and quarrelsome disposition. The rulings of the court excluding such testimony are assigned as error; and, also, the instruction given to the jury after they had been deliberating on the case several hours, to the effect that it was their duty to agree—to harmonize their views if they possibly could, consistently with their duty as sworn jurors.

Rosborough & Preston and S. A. Merritt, for the appellant, on the question of the admissibility of the testimony

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excluded, cited: 1. Greenl. Ev., par. 462; 2 Phil. Ev. 959 et seq.; *Patchin v. The A. M. & Co.*, 3 Kern. 268; *Hathaway v. Crocker*, 7 Metc. 262; *Gould v. N. L. Co.*, 9 Cush. 338; *Palmer v. Haight*, 2 Barb. 210; *Sprague v. Caldwell*, 12 Id. 516; *Howard v. C. F. I. Co.*, 4 Denio 502; *People v. Murray*, 10 Cal. 309; 1 Archb. Crim. Pr. and Pl. 400, 401; 1 Whart. Crim. L. 641.

No appearance for the people.

KELLY, J., delivered the opinion of the court, McBRIDE, C. J., and CUMMINS, J., concurring.

The defendant was convicted of murder in the first degree, and judgment pronounced against him accordingly. From this judgment the defendant appeals, and assigns errors as follows :

1. The court erred in excluding the testimony of the witness Samuel A. Merritt, and also that of the witnesses J. B. Pierce and S. Maloney, offered by defendant, for the purpose of impeaching the witness Kelly.

2. The court erred in excluding the testimony of J. B. Taylor, Joseph Boss, John Cody, Stephen Maloney, and J. P. Pierce, offered by the defendant to show that the general reputation of deceased was that of a violent and dangerous man, habitually addicted to quarrels, fighting, and bloodshed.

3. The court, after having excluded testimony as aforesaid, erred in its admonitions to the jury, who were still in doubt as to the degree of crime, on the third day of their deliberations, notwithstanding the exclusion of testimony as aforesaid.

4. Error affecting substantial rights of the defendant, the court erred in overruling his motion and denying a new trial.

The defense introduced a witness, Pierce, who stated that deceased was a large man, powerfully built, of great strength, and, in that respect, greatly superior to the defendant, who was a small, weakly man, which was all the testimony on that point. The defendant then offered to show by the testimony of J. B. Pierce, Stephen Maloney, John Cody,

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Joseph Boss, and J. B. Taylor, that they were acquainted with deceased, and knew his general reputation in the community where he resided and was well known, and that his general reputation was that of a violent and dangerous man, habitually addicted to general fighting and bloodshed. The court excluded the testimony so offered, and defendant excepted to such ruling.

Kelly, a witness for the prosecution, testified that on the evening before the homicide the deceased and defendant came to his saloon; that deceased struck defendant on the side of the face, so as to turn his face to one side, that it was more of a push than a blow, and defendant said, "I will kill you if you do that again;" that deceased replied, "You are not able to kill me," and defendant said he could kill six men while deceased could kill one; that what led deceased to strike or push defendant was they had taken a drink, and defendant pulled out his purse to pay for it, and deceased reached out his hand for the purse, and defendant told him it would cost him his life to take his purse.

On cross-examination this witness was asked if deceased did not say to him on that occasion that he intended to rob defendant of his purse for a Lemhi stake, and the witness replied in the negative. He was then asked if he had not in a conversation with Samuel A. Merritt on the second day after the homicide, in the street in front of Nicholdson & Clark's store in Idaho City stated to said Merritt, that on the occasion above referred to, the deceased told him he intended to rob the defendant of his money and keep it for a Lemhi stake, and the witness answered that he had not so stated, and that he had never made any such statement to Merritt or any one else. For the purpose of impeaching said witness, the defendant offered said Merritt as a witness to prove that said Kelly had at the time and place indicated and also at a subsequent time, made the statement so denied, and also offered J. B. Pierce and S. Maloney to prove that said Kelly had about the same time in their presence and in a public saloon made the same statement; all of which evidence, so offered, the court excluded, to which ruling the defendant excepted.

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The evidence or statement of the defendant made in pursuance of our statute is incorporated into the record sent up to this court to sustain the second exception, and is as follows: "I had been with deceased on the afternoon of the day preceding the killing. We had been drinking together on the evening of the — day of May. The day before the killing the deceased and myself went up to Bannock Bar. We stopped at the residence of Richard French, and I requested him to get supper for us, which he, French, agreed to do; and he went down town (Idaho City) to procure some articles. Shortly afterwards I went down to Idaho City to get a bottle of port wine for Mr. French, and the deceased followed me. I drank a great deal and became intoxicated. About eleven o'clock at night I started home, the deceased accompanying me. Between eleven and twelve o'clock we reached the house of Richard French. We went in. I had a bottle of port wine and some eggs. The deceased and I drank at French's. We left French's residence after remaining there some time. When I left French's I had my purse, containing about five hundred dollars in gold dust, in my pocket, and also a silver watch and chain. After we left French's deceased induced me to drink twice or more from the bottle of port wine which we had brought from French's, where I had left it. Deceased then blew out the candle which French had given us, or it went out, I don't know how, and took me into a vacant cabin, and where I immediately laid down and fell into a sleep. I have no recollection of anything until I waked up in the morning and found my watch and purse gone. The deceased was there. I accused him of taking them. He denied the charge. I then went down to the house of Richard French and asked him if I had my watch when I left his house the night previous. He stated that I had, and that he had asked me the time, and I had pulled out the watch and he saw it. I then returned to the cabin where I left deceased, and asked him to give me my money and watch, stating that he, the deceased, was a strong, healthy man and able to work, and that I was sickly and feeble and needed my means for my support. I reproached

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deceased with the manner he had treated me after my kindness to him. The deceased called me a son of a bitch, and told me to help myself. I then told him I would go down and have him arrested by the officers for robbing me. The deceased immediately rushed towards me in a threatening manner, saying he would wring my neck. He being a very powerful man, and fearing that he would kill me, or inflict some great bodily injury upon me, as he rushed towards me, I drew my pistol and fired twice, very rapidly, the deceased seizing my pistol with both of his hands, and trying to wrench it from my grasp. I did not know that any shot had taken effect on deceased; and in the struggle for the pistol, I drew my knife with my left hand, and, I suppose, I cut him, although I can not answer that I did. Upon repeating to deceased several times that I would cut him if he did not let go the pistol, he let go and went off. I did not know whether deceased was hurt or not. I went down to Idaho City, and was arrested at the Idaho brewery."

The first question submitted is: Did the court err in refusing to admit the testimony of S. A. Merritt, J. B. Pierce, and S. Maloney, offered by defendant for the purpose of impeaching the witness Kelly? The rule laid down for the introduction of other evidence to contradict a witness is this: If the fact to which the contradiction applies is a material fact, within the issue, he may be contradicted by any evidence or other statement, but when it is not material, and not within the issue, contradicting evidence can not be introduced. When a witness testifies to a material fact within the issue, the adverse party may give evidence that the witness has at some other time, or at various times, given a different statement of the fact. It goes to show that his present statement is erroneous or false as to such material fact. Such contrary statements may be proved by the witness himself or other evidence or by both.

In the cross-examination of witnesses, the adverse party is allowed great latitude of inquiry, limited only by the sound discretion of the court, with a view to test the memory, the purity of principles, the skill, accuracy, and judgment of the witness; the consistency of his answers

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with each other, and with his present testimony; his life and habits; his feelings towards the parties respectively, and the like, to enable the jury to judge of the degree of confidence that may safely be placed in his testimony. The rule is that when the question is relative to a fact collateral to the issue, and not material to it, the answer of the witness must be taken as it is given, and other evidence can not be offered to contradict him; and the reason of the rule is obvious. The cross-examination, to the extent mentioned, is allowed only for the purpose of exhibiting the witness in his true light to the jury, and when that is done the whole purpose of cross-examination is accomplished. A witness, therefore, can not be called to contradict what another witness has thus testified on cross-examination, relative to a fact not material to the issue.

Having laid down the rule, we are now to determine whether the testimony of Kelly was material to the issue, or whether it was collateral testimony. Kelly says "that on the evening before the homicide, the deceased and defendant came to his saloon, that deceased struck defendant on the side of the face so as to turn his face to one side," that it was more of a push than a blow, and defendant said: "I will kill you if you do that again." That deceased replied: "You are not able to kill me." And defendant said he could kill six men while deceased could kill one; that what led deceased to strike or push defendant was they had taken a drink, and defendant pulled out his purse to pay for it, and deceased reached out his hand for the purse, and defendant told him it would cost him his life to take his purse. Collateral testimony consists of those circumstances or facts given in evidence which are unconnected with the issue or matter in dispute. It is sometimes difficult to determine when a particular fact offered in evidence will or will not be material to the progress of the case. Had the killing taken place in Kelly's presence in consequence of the circumstances which he related, or rather if deceased had again struck or pushed defendant, and reached out for the purse, and defendant had killed him as he threatened he would, there could be no doubt as to the

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materiality of the testimony. We might go still further. If this circumstance had been the origin of a general quarrel which was followed up without abatement until the next day (the time of the homicide), and the killing had been the immediate result of an unabated quarrel which had thus originated, it would be material testimony.

Take his evidence alone, disconnected as it is from the homicide which took place on the next day, what inference can be drawn from the conduct of the parties, as testified to by Kelly on the day previous? Defendant and deceased were drinking together, deceased gave defendant a pushing blow on the side of the face, and reached for defendant's purse, as defendant took it out to pay for the drinks. Defendant said he would kill him if he did so again. Can it be inferred from this conduct that deceased attempted to rob defendant or that defendant intended to kill deceased? I can see no reason for drawing such an inference. The most that we could say of this conduct is, that it was rude and unmannerly on the part of the deceased, and the language of defendant was vile and extravagant. Certainly this did not prevent them from being friends. They went away together; went to French's cabin on Bannock Bar, where they had previously ordered supper; eat together; sat up some time and talked together after supper even to a very late hour; then went to a cabin together and slept together or in the same room, and remained there until the homicide the next day, and apparently were as friendly as companions generally are, if not more so. I can see nothing material in this testimony. Many other circumstances that took place between deceased and defendant on the day previous to the homicide may have been given in evidence with as much propriety as this circumstance. Had the defendant insisted that this circumstance was an attempt to rob him and he had conducted himself with proper caution in regard to the company of deceased, and there was probable ground for the jury to believe that deceased had been killed by defendant in the act of again attempting to rob him, the testimony might possibly have been material; but no such defense is contemplated. The defendant

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sought to justify the killing only upon the ground that deceased made an assault upon him with the intent to do him some great bodily injury, of which we shall speak hereafter.

The rule appears to be well settled that before the credit of a witness can be impeached by proof that he made statements out of court contrary to what he has testified to at the trial, he must first be asked as to time, place, and person involved in the supposed contradiction. We are of the opinion that the foundation was well laid, but we are of the opinion that the evidence of Kelly was collateral to the issue, and the defendant was bound by the answer of the witness Kelly. The evidence sought to be introduced to impeach his statements was evidently ruled out upon these grounds, and we think very properly.

The second error complained of is "that the court excluded testimony to show that the general reputation of deceased (being physically a powerful man) was that of a violent and dangerous man; habitually addicted to quarrels and bloodshed." The rule is well settled that the reputation of the deceased can not be given in evidence, unless, at the least, circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defense. It is no excuse for a murder that the person murdered was a bad man; but it has been held that the reputation of the deceased may sometimes be given in evidence to show that the defendant was justified in believing himself in danger when the circumstances of the case are equivocal. But the record must show this state of the case. The record submitted to show how the killing took place is the testimony or statement of the defendant given at the trial. It appears that the deceased and the defendant had eaten, drank, slept, and remained together in an amiable manner from some time in the day previous until the homicide. The defendant had lost his watch and purse of some five hundred dollars in gold dust, and accused the deceased of robbing him, and reproached him for the manner in which he (deceased) had treated him, and told him he would have him arrested by the officers for robbing him. The defendant says: "The deceased immediately rushed towards him in a threatening

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manner, saying he would wring my neck. He being a powerful man, and fearing that he would kill me, or inflict some great bodily injury upon me, as he rushed towards me I drew my pistol and fired twice very rapidly, the deceased seizing my pistol with both his hands, and trying to wrench it from my grasp. I did not know that any shot had taken effect on the deceased, and in the struggle for the pistol I drew my knife with my left hand, and I suppose I cut him, although I did not know that I did. Upon repeating to deceased several times that I would cut him if he did not let go of the pistol, he let go and went off. I did not know whether deceased was hurt or not. I went down to Idaho City and was arrested at the Idaho Brewery."

When a man is assaulted in the course of a sudden brawl or quarrel, he may in some cases protect himself by killing the person who assaults him, and excuse himself on the ground of self-defense; but in order to entitle him to do so, he must make it appear: 1. That before a mortal stroke was given, he had declined any further combat; 2. That he killed his adversary through mere necessity, in order to avoid immediate death. To justify an acquittal on the ground of self-defense, the danger must have been actual and urgent. No contingent necessity will avail, and when the pretended necessity consists of the as yet unexecuted machinations of another, the defendant is not allowed to justify himself by reason of their existence. In cases of personal conflict, in order to prove this defense it must appear that the party killing had retreated, either as far as he could by reason of some impediment, or as far as the fierceness of the assault would permit him. There may be cases sometimes occurring, though very rare and of dangerous application, where the attack is so fierce as not to allow him to yield a step, without manifest danger of his life or enormous bodily harm; and then, in order to save his own life, he may kill his assailant if there be no other means of escape. And it is not for the party killing to judge alone of the reasonable grounds of his apprehension of danger at the time; he must decide upon his peril upon the force of circumstances in which he is placed, for that is a

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matter which will be subject to judicial review. The defendant says that deceased rushed towards him with the threat that he would wring his (defendant's) neck, and he (defendant) drew his pistol and fired very rapidly twice. Defendant grabbed the pistol with both hands. Deceased was a very powerful man, much more so than defendant. Deceased was not armed, at least there is no evidence of the fact, and his having grabbed the pistol with both hands tends to show that he had no arms, or if he had he did not intend to use any. The defendant was armed with both pistol and knife. He stands his ground and fires twice before the deceased reaches him. He then draws his knife and stabs the deceased, without receiving any injury whatever himself. He gives no reason for not retreating, nor does he say that he would have withheld the shots if he could without endangering his own life. He gives no evidence of any hostile threats or any violence exhibited on former occasions against the defendant, nor does it appear but what the deceased and defendant had always been amiable friends.

We do not think that the evidence, applied to the rules of law, would permit the character of deceased to be made a matter of controversy in this case, and such testimony was properly ruled out.

The third point made by defendant's counsel is in reference to the admonitions of the judge to the jury. After the jury had been out, they came into the court on the third day and the judge charged them as follows: That it was the duty of the jury to agree. "And that considering the great expense attending criminal trials of this character, every reasonable effort should be made for that purpose. No pride of opinion should prevent any number of jurors from agreeing to a verdict when they can conscientiously agree to do so; and it is the duty of a jury to harmonize their opinions, if possible. I think, considering the importance of this case, I am justified in requiring you to make further effort to harmonize your opinions, and you will, therefore, return to consider further upon your verdict."

There is no limitation, either by statute or common law,

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for keeping the jury together. The time is entirely within the sound discretion of the court. Two days and a half is not an unreasonable time, especially when there is a probability that the jury can agree. We can see no abuse of discretion in this respect. To charge the jury that it is their duty to agree is one of the most common charges made by every judge. For that purpose, and that only, are they sent out to deliberate upon their verdict; otherwise they would give their verdict in their seats without consulting each other. Taken in connection with the latter part of the charge, which says they should harmonize their opinions if they can conscientiously do so, we are at a loss to discover how the charge should work any injury to the defendant if the jury were to find a verdict upon such a charge. It could not be inferred that they would be any more likely to convict than they would to acquit.

The ruling of the court below is sustained.

The order overruling the motion for a new trial is sustained and the judgment below affirmed, with directions to the court below to fix the time for carrying the judgment into effect.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

JANUARY TERM, 1869.

PRESENT:

HON. THOMAS J. BOWERS, CHIEF JUSTICE.
HON. RICHARD F. MILLER, } JUSTICES.
HON. MILTON KELLY, }

ANKENY & SON, APPELLANTS, v. R. W. HENRY,
RESPONDENT.

INDORSER—PROMISSORY NOTE—COMMERCIAL LAW—NOTICE.—The undertaking of an indorser is conditional; that is, his promise is that he will pay provided payment shall be demanded of the maker and due notice of his neglect or refusal shall be given.

INDORSEE—CONTRACT WITH INDORSERS.—The person receiving a note by indorsement contracts with the indorser whom he expects to hold, that he will present it to the maker at maturity, for payment, and if not paid that he will give notice of non-payment without delay.

APPEAL from the first judicial district, Nez Perce county.

George C. Hough, for the appellants.

Albert Heed, for the respondent.

The opinion was delivered by BOWERS, C. J., KELLY and MILLER, JJ., concurring.

This action is against the defendant as indorser on a

Opinion of the Court—Bowers, C. J.

promissory note. The declaration shows that on the ninth day of October, A. D. 1865, Jacob Hoffman made, executed and delivered his certain promissory note in writing, whereby he undertook and promised on or before the first day of June, A. D. 1866, to pay to R. W. Henry, the defendant in this action, the sum of, etc.; 2. That afterwards said R. W. Henry indorsed and assigned said note to L. P. Brown, who before its maturity, indorsed and assigned the same to the plaintiffs herein.

The defendant in his answer admits the allegations of the complaint, and this he might possibly very well have done, and yet have been entitled to judgment in his favor upon the pleadings. Such would undoubtedly have been the judgment had the attention of the court been called to the state of the pleadings; for we think it well settled that in order to charge an indorser, demand for payment of the maker, and notice of dishonor to the indorser, or the facts which excuse such demand and notice, must be proven by the plaintiff on the trial, as they constitute in great part the right to recover in the action, and as a necessary consequence of this, must be averred in the complaint.

The answer, however, in this case sets up as a separate and distinct defense that no demand for payment was made upon the maker Hoffman, and that no notice of dishonor was ever given whereby to charge the defendant as indorser.

The judge who tried the case in the court below (a jury having been expressly waived) perhaps simply for the reason as before stated, that his attention was not called to the character of the allegations in the complaint, or possibly for the reason that permission was granted to amend and such amended complaint left out of the record by mistake, seems to have heard the testimony, and found the facts as to the sufficiency of the demand and notice, and these are the only questions presented in the record for review. The facts as found by the court are:

1. Said note was not presented to the maker, Jacob Hoffman, for payment until the eighteenth day of June, A. D. 1866.

2. That no sufficient notice was given to the defendant,

Points decided.

R. W. Henry, of non-payment of the same, whereby to charge him as indorser, and upon the facts found, the court adjudged a dismissal of the action with costs to the defendant.

No objection appears to have been made to the facts found, and we are unable to see anything in the record from which it would appear that such findings are in the slightest degree unsupported. It is equally clear that the facts so found support the conclusion. The undertaking of an indorser is conditional; that is, his promise is that he will pay, provided the payment shall first have been properly demanded of the maker, and due notice of his neglect or refusal shall have been given. The person receiving a note by indorsement contracts with every one liable as indorser whom he expects to hold, that he will present it to the maker at maturity for payment, and in case of his failure to pay the same, that he will give notice of such failure within a reasonable time and without delay. Neglect in any of these respects will be fatal to a recovery.

The judgment of the court below must be affirmed with costs.

Judgment affirmed.

THE PEOPLE, RESPONDENTS, v. JOHN BUTLER, APPELLANT.

CRIMINAL LAW—MOTION TO SET ASIDE INDICTMENT—PRACTICE.—After pleading to an indictment, and the setting of the case for trial, it is too late to move to quash or set aside the indictment.

COURTS—OFFICERS.—Courts will take official cognizance of their own officers.

INDICTMENT.—The criminal practice act does not require the district attorney to sign indictments; nor does it prescribe a failure to sign as a ground for setting the indictment aside.

MOTION TO SET ASIDE INDICTMENT.—The statute having prescribed the grounds upon which a motion to set an indictment aside may be made, all other grounds are excluded.

INDICTMENT—ROBBERY.—In an indictment for robbery, the words "felonious" and "rob" carry with them the intent, and are sufficient.

IDEM.—An indictment is sufficient in substance if it describes the offense in the language of the statute by which it is created or defined.

APPEAL from the second judicial district, Ada county.

Opinion of the Court—Miller, J.

George C. Hough, for the appellant.

E. J. Curtis, district attorney, for the respondents.

Opinion by MILLER, J.; BOWERS, C. J., and KELLY, J., concurring.

The defendant was indicted by the grand jury of the county of Ada, at the November term, 1868, for the crime of robbery. Upon being arraigned, the defendant demurred to the indictment on the ground that "the facts therein stated do not constitute a public offense." After argument, the demurrer was overruled by the court, to which ruling defendant's counsel excepted. Afterwards the defendant moved the court to set aside the indictment on the ground "that said indictment is not signed by the proper officer; that said indictment is signed by E. J. Curtis as district attorney, when in fact one J. J. May is district attorney in and for the second judicial district, as will appear from the certificate hereto annexed." The motion to quash was overruled by the court. The defendant then entered a plea of not guilty, but afterwards, before trial, withdrew his plea of not guilty and pleaded guilty in open court; and judgment was pronounced on said plea that the defendant be imprisoned in the territorial prison for the term of five years. The defendant now appeals to this court from the judgment of the district court.

The points raised by the appellant are: 1. Upon the demurrer as to the sufficiency of the indictment; and, 2. By motion to quash, that the indictment is not signed by the proper officer. We think the motion to quash was made too late; particularly after a judgment upon the plea of guilty it can not be considered. The motion to quash was made under section 274 of the criminal practice act. The transcript shows that after the ruling upon the demurrer, and after the plea of not guilty had been entered, and the case had been set for trial, the defendant, without leave first had, and without withdrawing his plea of not guilty, filed his notice to quash. Assuming the motion

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good, it came too late. Under our statute it should have been made before demurrer and plea, and especially before the case is set down for trial of the issue of facts raised by the plea of not guilty. But, again, the grounds of the motion are not well taken. It states as its only ground that the indictment is not signed by the proper officer, for the reason that it is signed by E. J. Curtis, district attorney, whereas J. J. May is district attorney, as appears by the certificate of the latter's election thereto, in 1866, from the secretary's office. As to who was or was not district attorney, it is not relative to the point in issue. The court below finds against the motion, which for that purpose is decisive of the point, as courts will take judicial cognizance of their own officers. Assuming, however, the grounds of the motion are correct, the motion should be denied.

The criminal practice act nowhere in all its provisions for the finding or presentment of indictments makes it obligatory upon the district attorney to sign the indictment, nor does it prescribe, in case of his failure so to sign, that the same may be set aside. The statute creating the office of district attorney, etc. (Laws of the Third Session, p. 187, sec. 3), says that the district attorney "shall sign all bills of indictment that may be found by the grand jury. The criminal practice act, however, does not say that such failure shall vitiate the indictment, and be good grounds to set it aside. The criminal practice act, however, does prescribe how and for what reason an indictment may be set aside. Section 274 prescribes three grounds, and three only, for setting aside an indictment: 1. When it is not found, indorsed or presented as prescribed by this act; 2. When the names of the witnesses examined by the grand jury, or whose depositions are read before them, are not appended; and, 3. When any person other than the district attorney or the witnesses are permitted by the grand jury to be present while the charge embraced in the indictment is under consideration. Whatever may be the rule at common law, the statute, by defining and allowing the three grounds above stated, excludes all others. *Expressio unius personæ est exclusio alterius*. We must be governed by the

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statute in everything prescribing the manner, form, and substance of indictment, and the procedure thereunder, through the whole course of a criminal investigation. (*People v. Cronin*, 34 Cal. 191.)

But, again, the record shows that after making the motion to quash, and upon its being overruled, the case being set down for trial, the defendant withdrew in open court his plea of not guilty, and in open court made his plea of guilty, and judgment was afterwards rendered and duly entered. A plea of guilty confesses all the matters charged in the indictment; "it is a plea by which a defendant who is charged with a crime admits or confesses it." (1 Bouv. Dict. 573.) Judgment upon such a plea places the defendant in no worse position than upon the plea of not guilty as to all objections going to the body of the indictment. If the indictment does not charge a public offense, and the objection has been raised by the demurrer, as in this case, or by motion in arrest of judgment, the indictment and judgment should be set aside.

This brings us to the consideration of the points raised by the demurrer. The indictment is for robbery. "Robbery is the felonious and violent taking of money, goods, or other valuable thing from the person of another by force or intimidation." The point urged by the appellant against the indictment is that it nowhere shows "the intent of the defendant to steal or rob." This point is not well taken; we think the intent of the defendant to steal or rob clearly and sufficiently appears in the indictment. It charges first a felonious assault upon the person robbed, by the defendant putting him feloniously in bodily fear, thereby the feloniously and violent robbing, taking and carrying away by defendant from his person of the property. The words "felonious" and "rob" carry with them the intent, and are sufficient. "An indictment is sufficient in substance if it describes the offense charged in the language of the statute by which it is created or defined." (*People v. White*, 34 Cal. 183.)

Indictments in matters of averment are sufficient if they

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allege all the acts or facts which have been used by the legislature in defining the particular offense charged. (*People v. Cronin*, 34 Cal. 191.)

The appeal is clearly frivolous, and the judgment of the court below is affirmed.

THE PEOPLE, EX REL. W. W. GLIDDEN, PLAINTIFFS IN ERROR, v. J. H. T. GREEN ET AL., DEFENDANTS IN ERROR.

INTERVENTION—QUO WARRANTO. — The right of intervention given by statute exists only in actions which are purely civil in their character. The statutory proceeding in the nature of a *quo warranto* is *quasi* criminal in character, and in such action the right to intervene does not exist.

OFFICER—TERM OF OFFICE.—The right of an officer to hold office until his successor is elected and qualified, is as much a part of his estate in the office as the original term for which he was elected.

ERROR to the district court of the second judicial district, Ada county.

McBride & Henley, for the plaintiffs in error.

Scaniker & Burmester, H. E. Prickett and E. J. Curtis, for the defendants in error.

MILLER, J., delivered the opinion of the court, BOWERS, C. J., and KELLY, J., concurring.

On the fourteenth day of January, 1868, the people, upon the relation of W. W. Glidden, by the district attorney (under section 272 of the civil practice act (Laws of Idaho, first session, p. 138), filed the complaint herein, in the court below—third judicial district, in and for the county of Ada, charging that defendant Green, “without any legal right, warrant or authority whatever,” had since the sixth day of January, 1868, “held, used, and exercised” the office of county treasurer of Ada county; that Green had been elected to said office at the general election held in August, 1865, and entered upon the exercise thereof in January, 1866; that the relator was elected to said office at the election held in August, 1867, for two years, com-

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mencing January, 1868, and had duly qualified, and concludes by asking judgment of ouster from said office of defendant Green, and "further judgment that the said W. W. Glidden be entitled to the said office." To this complaint, the defendant Green on the twenty-fifth day of January, 1868, filed his demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and upon the further ground of the non-joinder of parties plaintiff. Upon the complaint and demurrer issue was joined and the case submitted, and after argument on the twenty-seventh of April, 1868, judgment was rendered sustaining the demurrer, with leave to the plaintiff to amend.

Afterwards on the fourth day of May, 1868, the people *ex rel.* Glidden, by the district attorney, filed their amended and supplemental complaint, pleading matters occurring after the filing of the original complaint, to wit, the removal of Green on the eighteenth of April, 1868, by action of the board of county commissioners for Ada county, and the appointment of Glidden to the office on the same day by said board, and his subsequent qualification under said appointment on the twenty-third day of April, 1868. After the joinder of issue on the demurrer to the original complaint and the submission of the demurrer upon argument to the judgment of the court, but before the rendition of the judgment thereon, to wit, on the twenty-fifth day of April, 1868, Thomas E. Logan filed his bill of intervention claiming that he was elected to the office of county treasurer of Ada county in August, 1866; that he had never received his certificate of election, that he had not taken the oath of office or filed the necessary bond required by law, but avers his readiness to do so, and that he was elected to hold the office for two years from January, 1867, and that Glidden claims to hold by an election held in August, 1867, for two years from January, 1868, and that no vacancy existed in said office at the time of Glidden's election which could be legally filled by election.

To the filing of this intervention, defendant Green objected, and also demurred to the same on the fifth day of

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May, 1868. The court below heard the objections to the filing of the intervention and the demurrer thereto at the same time, and gave judgment on the demurrer, and dismissed the intervention on the seventh of May, 1868. Afterwards, on the fourteenth day of May, the plaintiff did through the district attorney, in "open court," withdraw his amended complaint and abandon the further prosecution of said proceeding, and thereupon judgment was entered for the defendant Green for his costs and the complaint dismissed.

The intervenor, Thomas E. Logan, now sues out a writ of error to this court for the reversal of the judgment of the court below on the demurrer of defendant to his petition of intervention. The respondent in error, Green, moves this court to quash the writ upon the grounds that the same was improperly issued, in this, that there is no writ of error allowed under the statute, that title 10 of the civil practice act is in direct conflict with title 9, Laws of Idaho, first session, pp. 140, 147, secs. 281, 312, and that the appeal is the only proper remedy. We are not prepared at present to pass upon this motion, neither is it necessary in order to fully and fairly decide the case upon its merits. There are other points upon which it must turn, no matter what view we might take of the motion to quash the writ. The points presented for our decision are:

1. Did the intervenor, Logan, have the right to intervene in the original action of *The People ex rel. Gildden v. Green*?

2. If Logan did have the right to intervene, does his petition of intervention show a cause of action?

Section 601, p. 204, Laws of Idaho, first session, says: "Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, or in the success of either of the parties to the action, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both plaintiff and defendant."

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Section 602 says: "Any third person may intervene either before or after issue has been joined." Under section 602, admitting both his right to intervene and the sufficiency of his complaint in intervention, Logan was not in time in filing his petition according to the rule laid down in *Hocker v. Kelly*, 14 Cal. There the petitioner filed his bill after issue joined, and as the case was in the act of trial, and the court held he was too late. Here Logan files his petition after the joinder of issue on the demurrer, and the submission of the case thereon; and the court below, under the rule laid down in *Hocker v. Kelly*, above cited, should not have allowed him to file his petition, but should have sustained defendant Green's objections to its being filed in the first instance.

But to the first proposition upon the record as to Logan's right to intervene: The statute uses the word "action" in speaking of the right to intervene. This means a civil action purely. Is the original proceeding a civil action in which Logan seeks to intervene? We think not. It is a *quasi* criminal proceeding instituted in the name of the people in the discretion of the district attorney upon his own information, or "upon the complaint of a private person" against a usurper of any public office or franchise, etc., for the purpose of primarily ousting him, and the judgment need not necessarily be upon the right of the party alleged to be entitled to the office, but only upon the right of the defendant. This is by the express terms of the statute, section 276, civil practice act. The right to have the defendant arrested (section 275) and his being amenable to a fine in the discretion of the court (section 280) clearly stamp the character of the proceeding as one which is anything but a civil action. Originally this proceeding was purely a criminal one, being an information in the nature of a *quo warranto*, issued upon the application of the attorney-general from the king's bench, and the writ having issued, the defendant was ousted and punished; and as all offices were supposed to be in the king, the person entitled was thereupon inducted into it. (4 Cow. 100, note.) In New York under a similar statute to ours, in 22 Barb. 114, the

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court refused to mandamus the attorney-general upon his refusal to file an information upon the application of a person alleging himself entitled to an office, the court holding substantially that it was not a matter of right with any person claiming an office, to have an information filed in the name of the people for the ouster of an incumbent, but that it was a matter of discretion with the attorney-general, whether a proper case was made out for the issuance of the information, holding that the word "may" must be interpreted in its literal sense, and leaving it discretionary with the attorney-general. Can that be called a civil action, *i. e.*, the ordinary proceeding by which a right is enforced or a wrong remedied—when a party suing to enforce an alleged legal right, must get the permission of a second person to commence the action in the name of a third? The proposition seems very plain. If, therefore, the original proceeding be not a purely civil action, Logan has no right to intervene. But, again, if Logan does intervene, he must claim with the plaintiff or with the defendant, or against both. He certainly does not claim with the people, for they say by the district attorney that Glidden is entitled to the office. He does not claim with Green, for he says Green is a usurper, and that he (Logan) is entitled to the office. He must therefore claim against both the people and Green. Now, the people alone can have judgment of ouster. If he claims against both the people and Green, he claims against the prayer of the people, *i. e.*, the ouster of Green, and also prays at the same time the enforcement of his own right to the office, and his induction therein, which is absurd.

But admitting that the proceeding is purely a civil action, has the intervenor such an interest therein as will entitle him to intervene. The right to intervene has been taken from the code of Louisiana, and adopted into our practice. It is not every kind of interest which will entitle a party to intervene. The true rule is laid down by Chief Justice Field in *Haun v. The Volcano Water Co.*, 13 Cal. 62, and subsequently confirmed by the supreme court of California, in 18 Id. 378, 21 Id. 280. Says the learned judge in the case

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just cited: "The interest mentioned in the statute which entitled a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." Applying the rule as here laid down to the original proceeding of *The People ex rel. Glidden v. Green*, could the judgment in that case affect Logan's title to the office? We think not. Logan claimed by the election in 1866, Glidden by the election in 1867, and Green to hold for two years (under the election of 1865) from January, 1866, and until his successor was elected and qualified. It is difficult to see how a judgment in favor of Glidden, or of Green as against Glidden, could affect Logan's right to the office, or that he, Logan, "would either gain or lose by the direct legal operation and effect of the judgment."

But admitting the right of Logan to intervene, does his petition in intervention show a cause of action? Green, it is alleged, wrongfully withholds the office since January, 1867, but the petition directly avers that the intervenor has failed to qualify, although claiming by an election in 1866, to hold the office for two years from January 1867. Now, section 107, p. 499, Laws of Idaho, first session, says: "The county treasurer shall hold his office for the term of two years, and until his successor is chosen and qualified." The right to hold until his successor is elected and qualified is as much a part of the estate in the office as the original term of two years. (6 Wend. 422; 10 Cal. 38; 20 Id. 503.) Now, before Logan can show his right to the office, admitting his claim to be valid, he must procure the ouster of Green; before Green can be ousted, it must be shown that he wrongfully holds; to show this it must be proved not only that his successor has been elected, but that he has duly qualified—not only that he is entitled to the office, but that he is qualified to enter into the possession the moment of the defendant's ouster therefrom. The intervenor does not show himself in that condition, and the petition is in this respect fatally defective.

The judgment of the court below is affirmed.

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WILLIAM VINCENT, APPELLANT, v. THOMAS LARSON ET AL., RESPONDENTS.

EXECUTORY CONTRACT—CONSIDERATION—EVIDENCE.—It is competent for a party to an executory contract to show by parol evidence that the consideration has been paid.

WRITTEN CONTRACT, EXTRINSIC EVIDENCE TO EXPLAIN.—Extrinsic evidence is admissible to explain the recitals and promises of a written contract.

SPECIFIC PERFORMANCE—DISCRETION OF COURTS.—The specific performance of a contract is not a matter of right, strictly speaking, but a matter in the sound and reasonable discretion of the court.

APPEAL from the second judicial district, Owyhee county.

F. Ganahl and J. C. Henly, for the appellant.

Henry Martin, for the respondents.

Opinion by KELLY, J.; BOWERS, C. J., and MILLER, J., concurring.

Bill in chancery for the specific performance of a contract for the purchase and sale of certain mining ground, three hundred and fifty feet in the second south extension of the Oro Fino quartz lode. The case comes before us on appeal from the judgment of the court below, sustaining two demurrers to the bill. The bill avers the sale to plaintiff by Larson of certain mining ground, situated in Owyhee county, and consisting of three hundred and fifty feet of a quartz vein, on the thirteenth day of April, 1868; that on that day the defendant, Larson, executed and delivered to plaintiff a writing obligatory, under seal, stamped and acknowledged and recorded, by which he agreed to convey to plaintiff three hundred and fifty feet of a quartz lode—on the payment to him by plaintiff of the sum of five thousand two hundred and fifty dollars in coin, on or before the first day of June, 1868; that on the said thirteenth day of April, 1838, and after the execution of the instrument by him, defendant delivered lawful and peaceable possession of said three hundred and fifty feet of mining ground to plaintiff; that plaintiff entered into possession thereof; opened and developed the same; expended over one thousand dollars in so doing, and made all his preparations to continue the work-

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ing thereof; and by his labor thereon, the said mining ground has been proved to be of great value; that on the first day of June, 1868, he tendered to Larson the full amount of the purchase money in coin—five thousand two hundred and fifty dollars, and demanded of Larson a deed to said premises; that Larson refused to execute said deed; that he now brings the money into court and tenders it in payment for said mining ground; that Larson is wholly irresponsible and insolvent, etc., and asks that Larson be compelled to convey.

The points raised by respondents' counsel in the argument of the demurrer go to the validity of the contract or agreement between the parties for the purchase of the mine. For the purpose of considering these questions, we will give the language specially referred to in the contract. After reciting in the usual form that the said Thomas Larson is held and bound unto William Vincent in the penal sum of five thousand two hundred and fifty dollars, for which he will well and truly pay, etc., the condition is recited in the following words: "The conditions of the above obligation are such that whereas the above-bounden Thomas Larson has on the day of the date hereof sold to said William Vincent the following-described property, to wit: [here follows a description of the mining ground] for the sum of fifteen dollars per foot in coin, amounting to the sum of five thousand two hundred and fifty dollars, which said sum of money is to be paid to the said Thomas Larson, in coin, on or before the first day of June, 1868, and the said Thomas Larson shall, on the first day of June, 1868, or at any time before, on the payment of said sum of money, so to be paid as aforesaid, make, execute, stamp and deliver unto the said William Vincent, or to such person or persons as he may designate, a good and sufficient deed or deeds of conveyance of the said mining property heretofore described. Now, if the said William Vincent shall fail to pay the said sum of money at the time aforesaid; or if the said William Vincent shall so pay the said sum of money at or before the time aforesaid, and the said Thomas Larson shall upon such payment well and faithfully on his part perform the cove-

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nants herein, then this obligation to be null and void, otherwise to be and remain in full force and effect."

The grounds presented by the demurrer are:

1. That the contract sought to be specifically enforced is without consideration.

2. That the contract lacks the essential element of mutuality.

3. That it is not a matter of right to grant specific performance.

It is contended by respondents' counsel that this instrument constitutes the whole contract; that no evidence can be introduced *aliunde* to show that plaintiff entered into the possession of the premises, made improvements, paid or offered the purchase money, or in any way accepted the contract. Strictly speaking, all contracts are the subject of an offer. If one party says, "I will give you so much money for this thing," or the other says, "I will give you this thing for so much money," all agree that this is an offer to sell or buy, and if the offer is accepted, it ripens into a contract. To execute the contract, one party must pay the money, and the other must deliver the thing sold. But the execution of the contract is an independent matter, and may or may not immediately follow the contract. It may be immediately executed by one party and not by the other. Then the party who has executed would have a right to compel the other party to execute his part of the contract. If we take into consideration the force of the contract as contradistinguished from the execution of the contract, we shall not be at a loss to determine what evidence may be introduced to compel the performance or execution of the contract. Thus, if A. was to enter into a written contract to haul all the logs on a certain lot by a certain time for a specified price, no one would pretend that A., after reciting the contract, could not set up that he had hauled the logs within the time specified, and payment was refused. In fact, he must do so, and must substantiate it by proof, to entitle him to recover. It is true that hauling the logs was his part of the contract, but it was the performance, and if declared upon according to the tenure of the contract, his

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right to show the fact by parol evidence would be absolute, for it could not be ingrafted into the contract, when the performance was to take place within a limited time thereafter. Again, if notes had been given for the consideration money for the conveyance of land, could there be any doubt that such notes would be recoverable, when the deed expressed that the consideration had been paid in hand? Now, it is certain that the consideration can be inquired into by the contracting parties; yet, if you produce the higher proof arising from the deed when the consideration is confessed to be paid, it will not defeat a recovery on the notes; so when two parties make a joint conveyance of land, and the purchase money is paid to one, the other party may sue the one and recover the money for his share, notwithstanding the recital in the deed, that the money was paid to both. He is entitled to show by parol evidence the true fact, and if he is entitled to more than half the money, he may go beyond the deed, and show what share of the property he actually conveyed, in order to determine his share of the money.

Now, if A. give B. his bond or note, it would be not only extravagant, but wholly inconsistent with the character of the transaction to recite in the obligation that it was delivered and in the possession of A; still we would set that fact up in the complaint if suit was brought, with the right to prove it by parol evidence, nor is it common to make recitals of delivery in any contracts, notwithstanding delivery, possession, or performance must be averred when suit is brought by a party entitled to recover, and that averment must be made good by evidence beyond the contract itself.

Hence, it is certain that some evidence without must be admissible in the explanation or interpretation of every contract, however plain the meaning of the contract, or intelligible and certain its language. "Extrinsic evidence is admissible to identify its subjects, or its objects, or to explain its recitals or its promises, so far, and only so far, as it can be done without any contradiction of, or any departure from, the meaning which is given by a fair and rational

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interpretation of the words actually used." The bill in this case avers the acceptance by plaintiff, by entering into the possession, developing the mine, expending large sums of money, and, lastly, by offering the full payment of the purchase money, on the first day of June, 1868.

Says Judge Story: "A court of chancery will look to the substance and not the form of the contract." "The jurisdiction of courts of equity to decree a specific performance of contracts, is not dependent upon, or affected by the form or character of the instrument. What these courts seek to be satisfied of is that the transaction in substance amounts to, and is intended to be, a binding agreement for a specific object, whatever may be the form or character of the instrument. Thus if a bond with a penalty is made upon condition to convey certain lands upon the payment of a certain price, it will be deemed, in equity, an agreement to convey the land at all events, and not to be discharged by the payment of the penalty, although it has assumed the form of a condition only. Courts of equity in all cases of this sort look to the substance of the transaction, and the primary object of the parties." (2 Story Eq. sec. 715.) The "substance of the transaction, and the primary object of the parties" in this case was the sale of the mining ground in question. The bond in question was a written offer to sell, at a given price, provided payment should be made on or at any time before the first day of June, 1868. It is signed by the party to be charged, Larson, and expresses a consideration or imports one because under seal, and therefore is not within the statute of frauds. It has been accepted by the plaintiff, and is so averred in the bill, and being so accepted, the offer and its acceptance constitute the entire contract which is sought to be enforced. But respondents' counsel say there is no consideration. They take it that a consideration of some sort or other is absolutely necessary to form a good contract, that a *nudum pactum*, or an agreement to do or to pay anything on one side, without any compensation to the other, is totally void in law, and a man can not be compelled to perform it.

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If we take an abstract view of the question, that may be true, for the bond does not recite that Vincent paid Larson anything to make or keep the offer good. But we must not stop with this narrow construction of a question which admits a more enlarged view, and certainly many qualifications. We have said that this contract was under seal. Now, it can not be denied that contracts under seal are valid without a consideration expressed. Express contracts are specialties, or those which are made under seal, as deeds, bonds, and the like; they are not merely written, but delivered over by the party bound. The solemnity and deliberation with which, on account of the ceremonies to be observed, a deed or bond is presumed to be entered into, attach an importance and character which do not belong to a simple contract. In the case of a specialty, no consideration is necessary to give it validity, even in a court of equity. (3 Bing. 111, 112.) Such is the character of bonds of public officers, enfeoffments, deeds poll, covenants to renew, or perhaps more properly speaking, every bond imports in itself a sufficient consideration. Negotiable instruments, as bills of exchange and promissory notes, carry with them *prima facie* evidence of consideration. But suppose we consider this bond or agreement as an offer only. Strictly speaking, all contracts are made by saying I will give you this thing for this money, or I will give you this money for this thing. The offer must be before the acceptance. If it is accepted at once, it then becomes a binding contract. But it is not necessary that the offer should follow instantaneously. So long as the parties remain together and talk over the matter, if it is not expressly withdrawn, the offer is binding, if accepted. As a general rule the offer will continue only for a reasonable time. If the party addressed go away without accepting then he will be too late to come back and bind the proposer by accepting, unless the proposer shall assent in turn. All the law writers agree in this proposition. "The proposer may, himself, determine how long the offer shall continue. He may say, I will give you an hour, or until this time to-morrow, or next week, to make up your mind. Then the party to whom

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the proposition is made knows how long the offer is to continue. He may avail himself of the hour, the day, or the week given for inquiry or consideration, or making the necessary arrangements; and if within the prescribed time he expresses his assent [supposing the proposition not in the mean time withdrawn], he completes the contract as effectually as if he had answered in the same way at the first moment after the offer was made." Parsons on Contracts, vol. 1, 435; Story do., 381; Chitty do., 12-14. The only difference has been to enlarge the rule, so that the party who makes an offer on time, shall not be entitled to withdraw it before the lapse of the appointed time. Such is the doctrine in France, Scotland, and Holland; and in Louisiana, where the civil law was borrowed from the Romans. And many eminent law-writers argue that it is more consonant with the principles of justice to hold, that whenever an offer is made, granting to a party a certain time, within which he is to be entitled to decide as to whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time, unless by agreement with the other party. Chief Justice Story says:

"The reason which is given that the offer is without consideration and gratuitous, until accepted, does not seem to be well founded. The consideration is the expectation or hope that the offer will be accepted, and this is sufficient legally to support the promise. The agreement is therefore to be looked upon as an engagement by the one party that he will not sell within a certain time, in consideration that the other party will consider the matter and not give a refusal at once. Again, the making of such an offer might betray the other party into a loss of time and money by inducing him to make examination and to inquire into the value of the goods offered; and this inconvenience assumed by him is a sufficient consideration for the offer. Suppose that on faith of the offer he proceeds to make arrangements to enable him to purchase, or to make calculations to determine whether he is in a condition to buy, or whether the offer is worth accepting, and is fairly exerting

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his best judgment on the matter, is there any justice in allowing the other party to interfere and break his promise, after inducing a loss of time, or money, or convenience?"

Says Chief Justice Marshall, in the case of *Violet v. Pat-ten*, 5 Cranch, 142: "To constitute a consideration it is not necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made, and that the promise is the inducement to the transaction."

Now, in the case in question, did not Larson expect that some advantage would flow to him from Vincent for making the offer, or hope for it at least? It would seem that any gain to the promisor, or loss to the promisee, however trifling, ought to be sufficient consideration to support an express promise. In other words, should not the offer and acceptance be taken as simultaneous acts, and stand together as constituting an entire agreement, and such a one as the courts ought to enforce?

But admit that there is some difference of authority in regard to allowing the proposer to withdraw his offer, we can not do less than adopt the English law; on which all the authorities say that the acceptance is binding when the proposer does not withdraw his offer, and if the contract is under seal it expresses a consideration.

The bill in this case avers the contract under seal, avers acceptance by entering into possession under the contract, the development of the mine, expending large sums of money, and lastly, by offering the full payment of the purchase money on the first day of June, 1868. All this is taken as confessed by the demurrer, for which reason we must consider this agreement valid and binding.

In 3 Cushing, 224, *Boston and Maine Railroad v. Bartlett*, it was held that a proposition in writing to sell land at a certain price, if taken within thirty days, is a continuing offer, which may be retracted at any time; but if, not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract, the specific performance of which may be enforced by a bill in chancery. Fletcher, J., there observed: "In the present case, though the writing

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signed by the defendant was but an offer, and an offer which might be revoked, yet while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and during the whole of that time it was an offer every instant; but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendant is most surely in the right in saying that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract; and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance. But when the offer was accepted the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting in order to perfect a valid contract on the part of the defendants. It is precisely as if the parties had met at the time of the acceptance, and the offer had been made and accepted and the bargain had been completed at once."

This case is precisely analogous to the one now before us, only in this the court do not say that the contract was under seal, and probably it was not, for the court says the acceptance by the plaintiff constitutes a sufficient legal consideration for the engagement on the part of the defendant.

In a recent case in Massachusetts the court says: "A bill in equity to compel specific performance of a bond in common form, conditioned to convey to the complainant a parcel of land in the country, upon the payment of a stipulated price, on or before the first day of April, which alleges that the complainant, after date of the bond, occupied and improved the land with the respondent's knowledge and consent, and tendered the price on the twenty-fifth day of May next ensuing, is not demurrable upon the ground that time was the essence of the contract." (*Bernard v. Lee*, 97 Mass. 92.) Courts have gone still further, and in peculiar circumstances will enforce parol contracts for the convey-

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ance of land. (*Le Fevre v. Le Fevre*, 4 Serg. & R. 240. See also Dart on Vendors and Purchasers of Real Estate, 476; also note 1, 2 Story Eq., sec. 768.) It is unnecessary to discuss this part of the subject any further, or multiply authorities upon the point. It is sufficient to consider that the whole weight of authorities go to support the consideration as alleged in the plaintiff's bill.

The respondent says there is no mutuality in this contract. Under this head they urge that the plaintiff, not having signed the contract, there is nothing binding, for one can not be bound without the other. The contract was signed by Larson, the party to be charged. The name of Vincent was mentioned in the body of the contract, declaring that the contract run from Larson to him. This was necessary, because the contract must run to somebody in order to give a right. Vincent was that person; it was put there by his direction and consent. His name is as much in the contract as Larson's, for the purposes of the offer, and would bind him as much as it would Larson the moment he accepted the offer in full.

In the case of *Coleman v. Upcot*, 5 Vin. 527, pl., the court held "that an agreement concerning land was within the statute, if signed by the party to be charged; and there was no need of its being signed by both parties, as the plaintiff, by his bill for a specific performance, had submitted to perform what was required on his part to be performed." The same question is reviewed in the case of *Clayson v. Baily*, 14 Johns. 484, and fully discussed and numerous authorities cited.

It is so well settled in this country and in England that there is nothing to disturb the strong and united current of authority, that it is sufficient that the contract is signed by the party to be charged. Notwithstanding the opinion of Lord Radsdale to the contrary, quoted by the respondents; for that opinion is now universally overruled. Again, the respondent says the contract must be of such a nature as to give a right to one party as well as the other. We think this statement must be taken with some qualifications. "The contract may be of such a nature as to give a right

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to the performance to the one party which it does not give to the other. As, for instance, where a lessor covenants to renew upon the request of his lessee, or where the agreement is in the nature of an undertaking. But the more accurate view of such cases as the first, perhaps of all that could be quoted as wanting mutuality, seems to be that they are conditional contracts. And when the condition has been made absolute, as, for instance, by a request to renew, they would seem to be mutual, and capable of enforcement by either party." (Fry on Special Performance, sec. 291.)

. Nor can it be sustained upon any very good ground that the right to renew is based upon the consideration in the old lease. We know that courts have sometimes so held, but it seems more like an apology for a reason than any reason actually shown. Suppose the covenant had been on the part of the lessee, leaving it optional with the lessor or not, should we say the right to compel a renewal was based upon the ground that the lessor had had a former lease of the promise, and that was a consideration in a subsequent offer? Is it not more reasonable to say that the obligations in the old lease were mutual, and both were discharged, and the covenant to renew is the renewal of the old covenant in the nature of a special undertaking, to be accepted or not by the lessee? So it might be said of leases when there is a covenant to sell, leaving it optional with the lessee to purchase at the expiration of his lease. Or, to use the words of Mr. Fry, and say "it is a continuing contract at the option of the lessee to determine it."

We have said so much incidentally on this question, it needs but little to explain wherein lies the mutuality of this contract, viewing the contract as an offer on time, and every instant an offer until accepted, and the contract being in all its terms absolute by paying the money or offering the same, the contract was then perfect and binding on one party as much as the other. To say that Larson could not enforce the contract before it was accepted, would be saying what every proposer might say and continue to say as long as he was submitting his proposition; but he could not say so

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after his proposition had been accepted. It is a self-evident proposition, as much as two and two make four, that Larson could enforce this contract the moment it was completed, and could ever since do so by accepting the money, to wit, the five thousand two hundred and fifty dollars, which all agreed was the consideration to be paid.

Again, the respondents say it is not a matter of right to grant specific performance of contracts. They do truthfully state this proposition. It is not a matter of right in either party, but, as Judge Story says: "It is a matter of discretion in the court; not, indeed, of arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but that sound and reasonable discretion which governs itself, as far as it may, by general rules and principles; but at the same time which withholds or grants relief, according to the circumstances of each particular case, when these rules will not furnish any exact measure of justice between the parties."

Human laws are too uncertain and humanity too imperfect to prescribe a rule for every imaginable question. Something must be left to the judge. Some discretion must be exercised by the court in the administration of justice, or we shall fall far short of doing unto others as we would that others should do unto us. It is true, we learn justice from the law, and from our innate knowledge of right and wrong, and with the application of legal learning, correcting and distinguishing it as best we may, for the purposes of administration. Equity sometimes stops short of the law, and sometimes goes far beyond. Whoever should undertake to lay down rules and principles, as absolute authority to govern all cases, would fall far short of administering justice in any court. But guided by the unerring knowledge of the past in the administration of justice, we shall find a safe and convenient guide to our future inquiries, and with little hesitancy be able to apply them with beneficial interest to all the transactions of men.

We have already shown that the courts of equity will look at the substance of the transaction to see if it is a binding agreement for a specific object. If a court of law

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is inadequate to relieve the injured party, only by a compensation in damages, a court of equity will redress the wrong by declaring a performance in specie. The judgment of a court of law operates on the right of a party, and the decree of a court of equity on the person. This constitutes the distinction between a court of equity and a court of law, on the ground that damages at law may not in the particular case afford a complete remedy.

“The cases in which a court of equity decrees specific performance of contracts, are those where damages recovered at law would not answer the intention of the parties in making the contract.” (*Seymour v. Delaney*, 3 Cow. 445.)

“The court decreed specific performance of a contract for the sale of lands, though the contract was in the form of a penal bond, and defendant resided out of the state.” (*Telfair v. Telfair*, 2 Desau. 271.)

“When, from the nature of the relief sought, performance of a covenant in specie will alone answer the purposes of justice, the court of chancery will compel a specific performance instead of leaving the complainant to an inadequate remedy at law.” (*Stuyvesant v. Mayor etc. of New York*, 11 Paige, 414.)

“Equity views a bond conditioned to convey land as articles of agreement, and will decree a specific performance of the condition.” (1 Gilman, 454.)

“This court has power to decree specific performance of a bond with a penalty, conditioned for the conveyance of land.” (*Ensign v. Kellogg*, 4 Pick. 1.)

“Equity may decree the performance of a general covenant of indemnity, though it sounds only in damages.” (*Champion v. Brown*, 5 Johns. Ch. 406.) See also *Parkhurst et al. v. Vancourtland*, 14 Johns. 15.

Now, is there anything inadequate in decreeing the specific performance of the contract at bar? On the contrary, from a survey of the whole case, all the equities appear to be with the plaintiff.

He entered into possession of the mining ground under the bond, and was inducted into possession by defendant, opened the mine, expended money, and made the mine

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valuable; and on the day fixed in the bond, offered full payment of the agreed purchase money; defendant all the while standing by silent, and without revoking the offer made in the bond. Such an agreement is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived. He can not now, after the contract being thus executed, be allowed to interpose his defense by demurrer. To allow such a course, would be clearly against equity and good conscience.

Judgment reversed and cause remanded with directions to the court below to overrule the demurrers to the complaint and to allow the defendants to answer.

CHARLES KRAFT, RESPONDENT, v. HENRY GREATHOUSE, APPELLANT.

STATUTE OF LIMITATIONS.—The statute of limitations can not be raised in the supreme court for the first time, as upon a general demurrer to the complaint. It must be taken advantage of in the court below, by answer or demurrer.

STATUTE OF FRAUDS.—The statute of frauds must be pleaded in the court below, or it can not be considered upon appeal.

APPEAL from the second judicial district, Ada county.

Scaniker & Burmester, for the appellant.

H. E. Prickett and J. Brumback, for the respondent.

KELLY, J., delivered the opinion of the court, MILLER, J., concurring.

This action is brought upon an account for the recovery of eight hundred and fourteen dollars. The complaint alleges that the defendant and plaintiff on the thirteenth day of March, 1865, entered into a verbal contract whereby the plaintiff was to board one or both of the two sons of defendant, William and George, and to advance, when necessary, money in payment for tuition, clothing, etc., furnished them, and defendant agreed for each and every day the plaintiff should board his said sons or either of them, he

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would pay the plaintiff one dollar per each day for each, and all money advanced by plaintiff for tuition, clothing, etc., furnished his said sons by plaintiff. Then follow two counts. The first count alleges that in pursuance of said contract, plaintiff boarded, schooled, paid tuition, etc., for defendant's sons up to the thirty-first day of July, 1866, when plaintiff and defendant had a settlement, and upon an account stated there was found due plaintiff the sum of seventy-one dollars.

The second count alleges that the plaintiff, in pursuance of the aforesaid contract, continued to board, school, and clothe said children from the thirtieth day of July, 1866, until the thirtieth day of July, 1868, showing the particular items, etc., amounting to seven hundred and forty-three dollars. And he then prays judgment for the seventy-one dollars, and the seven hundred and forty-three dollars, amounting in the whole to eight hundred and fourteen dollars. The summons and complaint were duly served. The defendant made no appearance, and judgment was entered by default, by the clerk in the court below, from which defendant appeals to this court. The complaint, service, default, and judgment, in all things appear regular.

But appellant interposes two objections to the complaint, upon which he asks a reversal of the judgment—to the first count, the statute of limitations; and to the second count, the statute of frauds. Appellant's counsel claim that under a demurrer which states in general terms that the complaint does not contain facts sufficient to constitute a cause of action, the defense of the statute of limitations may be made; and when demurrable on the ground that the complaint does not state facts sufficient, etc., advantage can be taken of the defect at any stage of the proceedings, either before or after judgment—the defect is never waived. In support of this position counsel refer to authorities in New York and California. In New York the rule of decision is that a general demurrer raises the question as to the sufficiency of the complaint. (1 Seld. 357.) But there are certain exceptions. The statute of limitations can not be raised except by answer. (3 New York Stats.) Appel-

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lant's counsel also insist that in California, under a statute precisely in the words of ours, a general demurrer has been held sufficient to raise the statute of limitations up to 1864, and in the case of *Brown v. Martin*, 25 Cal. 83, where a majority of the court hold that a general demurrer would not lie, unless it specially referred to the statute of limitations, was not the law in the case, but that the dissenting opinion was the better law, and ought to govern in such cases. The minority opinion refers to the case of *Ellison v. Halleck*, 6 Cal. 393. The claim in this case was against the estate of a deceased person, and there was no allegation in the complaint that the claim had been presented to the defendants, executors of Folsom, and had been rejected by them. Under the laws of California, "no holder of any claim against an estate shall maintain any action thereon, unless the claim shall have been first presented to the executor or administrator." It is further provided, that every claim shall be accompanied with the affidavit of the holder, that the amount is justly due, and that no payments have been made thereon. For the want of this affirmative matter in the complaint, the defendants put in a general demurrer. The court say, upon the question whether this point should have been taken advantage of by answer or demurrer: "We are satisfied that the demurrer was properly interposed. The non-presentation was not a matter of avoidance only, to be taken advantage of by plea. The general right to sue an administrator was taken away by the statute, except in case of presentation and rejection of the account, and the declaration should have set out the exception." The reason of the rule is this: the statute of limitations does not take away the right, but only goes to the remedy. In suing the claims of deceased persons, the statute does not take away the right to sue the executor or administrator, unless certain things are done. If statutes of limitation did take away the right, as appellant's counsel contend, then a general demurrer would be as effectual in the case of *Brown v. Martin* as in the case of *Ellison v. Halleck*, and we think the court would have so held. For if the right is destroyed the court has no jurisdiction, and that question should be con-

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sidered at any stage of the proceedings, either in the original or appellate court. Statutes of limitation are interposed for the purpose of preventing litigation. It has been wisely determined there ought to be some time fixed in which parties ought not to be allowed to set up stale demands. They are denominated statutes of repose, and proceed upon the presumption that claims ought to be extinguished when they are not presented within a proper time. The language of Chief Justice Murray in the case of *Billings v. Hall*, 7 Cal. 4, answers this question fully. He says, "that statutes of limitations are designed to effect the remedy, and not the right or contract; that they do not enter into the contract as part of the law thereof; and that it would be inconsistent with sound morality and wise legislation to suppose that it was ever intended that when a party gave his obligation to pay a particular debt, he was presumed to have had in his mind a particular period of time beyond which, if he contracted his obligation, his liability would cease."

Appellant's counsel contend that it is a personal privilege with them to pay the judgment in the court below, or come into this court and have it reversed. The personal privilege with the defendant was to go into the court below and plead the statute of limitation. Having failed to do so, or make any appearance whatever, he comes to this court and asks to have a demurrer understood as being interposed to the sufficiency of the complaint on the ground that the complaint does not show that the cause of action is within the statute of limitations. If the court had no jurisdiction to render a judgment in any case barred by the statute of limitations, then appellant's counsel are right, and the case ought to be reversed. Suppose the defendant had gone into the court below, and had answered to the merits, and the issue had been tried, and judgment went against him, could he then have come to this court upon the same ground on which he now asks to have the judgment reversed? Most certainly he could, if appellant's counsel are right in this, that the statute of limitations takes away the right, because the court would then have no jurisdiction.

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Again, suppose he had gone into the court below, and expressly waived the statute of limitations, could the court then try an issue or render a judgment upon any matter submitted outside of and beyond the statute of limitations? Certainly not, if the court had no jurisdiction; for then stipulation could not confer jurisdiction. In the case of *Stewart v. Sander*, 16 Cal. 372, the court refused to allow the answer to be amended so as to set up the statute of limitations, although it was apparent upon the face of the complaint that the statute had run. A motion to dismiss the action and a motion in arrest of judgment were both overruled, and the ruling in the court below was sustained unanimously by all the judges of the supreme court. (See also *Cooke v. Spear*, 2 Cal. 411.) In the case of *Robinson v. Smith et al.*, 14 Cal. 254, two defendants filed a joint plea of the statute of limitations, and the plea being held bad as to one defendant, the court on the trial permitted the other defendant to file a separate plea of the statute on appeal: held, this act was in the discretion of the court and no abuse of its power.

In *De Uprey v. De Uprey*, 24 Cal. 352; *Brown v. Martin*, 25 Id. 82; *Farwell v. Jackson*, 28 Cal. 105, it is decided that when the statute of limitations is raised by demurrer, the demurrer must state the objection. In the following cases it was decided that the statute of limitations must be raised in some form in the court below, either by answer or demurrer. (*McDonald v. Bear River Co.*, 13 Cal. 221; *Gratten v. Wiggins*, 23 Id. 16; *Brown v. Martin*, 25 Id. 82; *People v. Broadway Wharf Co.*, 31 Id. 33; *Vassault v. Oats*, 31 Id. 225.) From these decisions and the decisions in New York and other states, and the authorities laid down in the text-books, we must hold that the statute of limitations is a personal privilege which goes to the remedy, and not the right. The defendant may plead it, or waive it. If he fails to plead it in any form, he thereby waives it, and he can not take advantage of his waiver in this court. If for any excusable neglect the defendant allowed judgment to be taken against him in the court below, his remedy was in that court under the sixty-eighth section of the practice

Points decided.

act. If he had offered to plead the statute of limitations and his offer had been refused, it might be a good ground to come to this court. But such questions must be first raised in the court below. It is true, in early days courts were adverse to pleading statutes of limitation, and they often held very rigidly, but the rule has been very much relaxed in modern courts, and we think with good effect. What we do hold is that the statute of limitations must be pleaded either by answer or demurfer, and that question must be presented to the court below. It is contended that the second count is barred by the statute of frauds, for the reason that the claim is upon a verbal contract made on the thirty-first day of March, 1865, sixteen months, or more than one year, prior to the thirtieth of July, 1866.

The performance of the contract, as shown by the complaint, commenced on the thirty-first day of March, 1865, and not when the parties looked over their accounts and struck a balance. It was a continuing contract from day to day, subject to be terminated by either, or both parties. Hence there are two very cogent reasons why this part of the judgment should not be reversed: 1. The contract is not within the statute of frauds. 2. The statute of frauds has never been pleaded. (*McLees v. Hale & Brown*, 10 Wend. 426; *Osburn v. Endicott*, 6 Cal. 153.)

Judgment of the court below affirmed.

BOWERS, C. J., dissenting:

I dissent from a part of the conclusion of the court.

GEORGE F. SETTLE, PLAINTIFF, v. E. C. STERLING,
PRISON COMMISSIONER, DEFENDANT.

REQUISITION—AGENT—OFFICER.—The position of an agent named in a requisition to receive and return a fugitive from justice, is an office; and such officer is entitled to the fees and emoluments fixed by law for his services.

GOVERNOR—FEES OF AGENT.—The governor has a right to the appointment of an agent; but can not fix any terms as to his fees.

AGREEMENT—AGENT—FEES.—Any agreement by an agent named in a requisition to take less or more than the fees allowed by law is illegal and void.

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JUDGMENT rendered *pro forma* in the district court of the second judicial district, Ada county, and adjourned into this court by consent of parties.

Frank Ganahl, for the plaintiff.

E. J. Curtis, for the defendant.

MILLER, J., delivered the opinion, KELLY, J., concurring, BOWERS, C. J., dissenting.

This case comes before us upon the consent of parties. The parties hereto, under section 336, Civil Practice Act, page 153, Laws of Idaho, first session, have, without action, agreed upon a case, and presented a submission thereof to the court below, duly verified according to law by both their affidavits. The court below entered a judgment *pro forma* in favor of the defendant, and from that judgment, by consent of both parties, had in open court, this case comes before us. The case on the agreed statement and submission duly verified as aforesaid by the affidavits of both parties was argued in due course by counsel for both parties before a full bench, and afterwards judgment thereon was duly entered by Justices Kelly and Miller (Bowers, C. J., being absent at court in Boise county), on the sixth day of March, 1869, in favor of the plaintiff, and directing a writ of mandate to issue, commanding the defendant to audit the account of plaintiff; which writ did issue on the same day and was obeyed by defendant.

The statement as submitted and sworn to by both parties, states as follows:

1. That in September, 1868, the grand jury of Alturas county duly presented and found by their indictment one John A. Andrews guilty of the crime of grand larceny.

2. That at that time the said John A. Andrews was a fugitive from justice, being then in the state of Indiana.

3. That the governor of Idaho duly issued his requisition upon the governor of Indiana for the body of said John A. Andrews, and duly appointed the said George F. Settle the agent for the territory to demand of the governor of Indiana

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the said John A. Andrews to bring him to this territory in pursuance of said requisition.

4. That before issuing his said requisition and the appointment thereunder of said Settle, by the governor as aforesaid, he, the said governor, required of said Settle, the execution by him of the paper hereto annexed.

5. That said Settle, in pursuance of said requisition, proceeded to Indiana, and did perform all his necessary duties under and by virtue of said requisition, and did make and file before the said Sterling, as prison commissioner, his account for his said services, duly verified according to law, and that said account is true, just, and correct.

6. That said account was so presented to and filed by said Sterling, as prison commissioner, on January 2, 1869, and the services rendered therein were so rendered by said Settle from the twenty-second of September, 1868, to the twenty-fifth of December, 1868, under said requisition.

7. That said Sterling, as prison commissioner, refused on the second day of January, 1869, to audit said account of said Settle, and still refuses to audit said account, on the ground and for the reason of the execution by him of the paper hereto annexed.

8. The said Settle asks for the peremptory writ of mandate of this court compelling said E. C. Sterling, as prison commissioner, to audit his account aforesaid against the territory. Signed,

GEORGE F. SETTLE,
E. C. STERLING.

Territory of Idaho, county of Ada, ss.

George F. Settle and E. C. Sterling, being each duly sworn for himself, says that the foregoing statement of facts is true and correct; that the controversy is real and the proceeding in good faith to determine the rights of the parties thereto.

GEORGE F. SETTLE,
E. C. STERLING.

Subscribed and sworn to before me this sixteenth day of January. 1869.

SOL HASBROUCK,

Clerk district court, second judicial district, of Idaho Territory.

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BOISE CITY, Idaho Territory, September 24, 1868.

Whereas, a certain bill of indictment has been found against one John A. Andrews by the grand jury of Alturas county, Idaho territory, bearing date September 11, 1868, charging said Andrews with committing a felony, and

Whereas, said Andrews has fled this territory and is now in the state of Indiana, and

Whereas, the governor of Idaho, to wit, Hon. D. W. Ballard, is about to issue his requisition upon the governor of Indiana for the rendition of said John A. Andrews as a fugitive from justice, and is about to appoint George Franklin Settle as a suitable person to receive and return said Andrews from the state of Indiana to the sheriff of Alturas county, Idaho. Now it is expressly understood and agreed on the part of said George Franklin Settle, by and with the governor, D. W. Ballard, upon the issuing of the said requisition, and his appointment as agent, or suitable person to return said Andrews, and in consideration of the interest of said George Franklin Settle in the property stolen or embezzled, by said Andrews, charged in said indictment as a felony, and a hope to recover the same, and in consideration of the sum of one dollar, advanced by the governor, the receipt of which is hereby acknowledged, I hereby agree to accept said agency, and proceed to the state of Indiana with said requisition, and use due diligence to return said fugitive Andrews. And I further certify and agree, that no other or further charge or claim shall ever be made by me, or in my behalf, against the territory of Idaho, or against Alturas county, on account of any services I may or shall render by reason of the issuing of said requisition for said John A. Andrews.

In witness whereof I have hereunto set my hand this twenty-fourth day of September, 1868.

GEORGE FRANKLIN SETTLE.

Attest:

S. R. HOWLETT.

The question submitted for the decision of the court was, whether or not the said Settle was bound by the instrument so signed by him, under the circumstances.

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However commendable the conduct of the governor in looking after the pecuniary interests of the territory may be, and as in this case the same really was, I think the paper signed by Settle no bar whatever to the enforcement of his claim against the territory.

Looking to the instrument alone, and not to the statement, for any elucidation of the circumstances under or the consideration upon which the same was made, and treating the same either as a contract *sui generis* or a waiver, it is alike objectionable, either as being based upon no consideration or upon an illegal one. The paper reciting the fact of the indictment, and that the governor is about to issue his requisition for Andrews, and to appoint Settle the agent of the territory to execute the same, states as follows:

“Now it is expressly understood and agreed, on the part of said Settle, by and with the governor, D. W. Ballard, upon the issuing of the requisition, and his appointment as agent to return said Andrews, and in consideration of the interest of said Settle in the property stolen or embezzled by said Andrews, and a hope to recover the same, and in consideration of the sum of one dollar, advanced by the governor, the receipt of which is hereby acknowledged, I hereby agree, etc.”

The considerations, then, for Settle's agreement not to charge the territory anything for his services are: 1. The issuing of the requisition and his appointment as agent thereunder; 2. Settle's interest in the property stolen by Andrews, and “a hope” through the requisition and by its means to recover the same; 3. One dollar by the governor to him paid. All three of these considerations are illegal, and no contract will be enforced based thereon. If the first be the only consideration, then the instrument signed by Settle, and the agreement therein contained, was the inducement to the governor to issue his requisition and appoint Settle the agent thereunder. It was either the governor's duty to issue the requisition for Andrews, or it was not. It was either an illegal act, or a legal one. If the agreement made by Settle was the consideration for the act in either case, or the inducement to it, it was based upon

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an illegal consideration—being against public policy—and therefore void; if the second consideration, *i. e.*, “a hope” by Settle through the requisition to obtain his property by Andrews stolen, the agreement by Settle not to charge the territory anything is based upon a consideration clearly illegal—being against public policy—in this, that it is against the administration of public justice. For how could Settle expect to realize “a hope” of recovering his stolen property? By obeying the requisition, bringing back Andrews and criminally prosecuting him? Certainly not. Only by disobeying the requisition—failing to enforce it—and with Andrews compounding the felony charged against him.

If the third consideration, to wit, the one dollar by Governor Ballard advanced, be the true consideration, it is equally illegal, and alike fatal to the agreement. The position of agent, under the requisition, was an office, and at the time of the then appointment and the rendition of the services by Settle thereunder, with its fees and emoluments fixed by law. The governor had the right of appointment, but could not fix any terms as to its fees. He could not buy them for one dollar or any other sum. Any agreement by an officer to take less or more, or any other sum than the fees allowed by law, would be illegal and void. (*Vide* 7 Bac. Abr., title Office and Officers.) The governor, in advancing the one dollar, was not purchasing the fees of the office for himself or for any other person; the one dollar was but the ancillary consideration to the consideration of the appointment of Settle as the agent of the territory, and a waiver by Settle of all compensation in consideration of his appointment would be clearly illegal, as it would be buying an office pertaining to the administration of public justice. (*Vide* 7 Bacon, *supra*.)

But again viewing the instrument signed by Settle as based upon no consideration, but as being simply a waiver of his right to the fees of the office of agent under the requisition, is he estopped by it to claim his compensation allowed under the law? I think not. It has been clearly established that an officer can not assign the fees of his office; they can not be levied on; and he can not sell them,

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or their source—his office. If he can not assign or sell, he can not clearly waive. He can, it is true, refuse to demand them or to enforce his claim, and in this way may waive, but, when demanded, if entitled to them, they must be paid. But again, admitting the instrument signed by Settle to be valid and binding upon its face, the statement shows clearly that it was given by Settle upon an illegal consideration. Parol evidence is always admissible to show the illegality of a contract, no matter how valid it may be upon its face. (Chitty on Con. 731.)

The statement sworn to by both Settle and Sterling distinctly states that before issuing the requisition, and the appointment of Settle, the governor required of Settle the execution of the aforesaid agreement. (*Vide* statement, sec. 4.) In other words, the signing of the instrument was the inducement to the governor to issue the requisition and to appoint Settle.

It was either the governor's duty to do this, or it was not. It was either legal or illegal. Any contract made with an officer to do an illegal act is clearly void, and so also any contract to induce him to do his duty. (*Vide* Chitty on Cont., title Illegal Contracts; Story on Cont., title Illegal Contracts.) Here the statement is full and to the point. Section 4 uses the word "required," and this is sworn to by both Settle and Sterling, the parties to the submission. This point is alone decisive of the case.

Again, the contract, or the paper signed by Settle, is unstamped, and so remains, and under the laws of congress of 1862, in that condition can not be made available as a defense.

A mandamus is ordered to be issued, commanding the defendant to audit the plaintiff's account.

Opinion of the Court—Bowers, C. J.

WA CHING ET AL., PLAINTIFFS, v. CHRIS. CONSTANTINE, DEFENDANT.

PRACTICE—CHANCERY PLEADING.—The old rules of chancery pleading are abolished by the code.

IDEM—EQUITABLE DEFENSE—PLEADING.—Under the provisions of sec. 49 of the code, an equitable defense may be pleaded to a legal cause of action.

IDEM—EQUITABLE JURISDICTION—LEGAL JURISDICTION.—Legal and equitable relief may be sought in the same action, and by the same complaint, but the grounds therefor must be distinctly and separately stated.

ADJOURNED into this court from the district court of the second judicial district, Boise county. Demurrer to complaint.

Ainslie & Foote, for the plaintiffs.

S. A. Merritt, for the defendant.

BOWERS, C. J., delivered the opinion, KELLY and MILLER, JJ., concurring.

This cause comes into this court from the second judicial district court, by agreement of the parties, under and in accordance with the provisions of section 326 of the civil practice act. The question submitted for determination is, whether or not an action at law may be blended with a petition for auxiliary relief addressed to the equity powers of the court, under the law and practice of this territory. It is conceded by counsel, that our system as defined in the practice act is the same as that of California. Under the practice in California the actions may be so blended, the courts only requiring that, "in the comments of a complaint in an action at law, the grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought." (*Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 544.) Section 1 of our practice act reads: "There shall be in this territory but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be the same at law and in equity." Under a section substantially the same as this, it has been

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held in California, that civil actions embrace both legal and equitable actions. (19 Cal. 481.) Also, that the forms of action have been abolished by the code. (24 Cal. 463; 18 Id. 127; 16 Id. 243; 12 Id. 147.)

Section 39 of our practice act is as follows: "The complaint shall contain: 1. The title of the action, specifying the name of the court and the name of the county in which the action is brought, and the names of the parties to the action, plaintiff and defendant. 2. A statement of the facts constituting the cause of action, in ordinary and concise language. 3. A demand of the relief which plaintiff claims. If the recovery of money or damages be demanded, the amount thereof shall be stated."

This is precisely the language of the thirty-ninth section of the California practice act, and the courts of that state have in a number of instances given a judicial construction to the section. We feel fully justified in saying that the conclusion they have reached is, in effect, that the old rules of chancery pleading are suspended by the codes. (12 Cal. 147.) The forty-ninth section of our practice act is as follows: "The defendant may set forth by answer as many defenses and counter claims as he may have. They shall each be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished."

Now, were we to hold that actions at law and in equity can not be blended in this territory as in California, it would be equivalent to nullifying section 49 of the practice act, to say nothing of its effect upon the first and thirty-ninth, which three sections, it will be seen, form, in great part, the substantial base upon which our code of procedure is erected. No one will deny but that actions at law are now, and so long as our practice act remains as it now is will be often brought in the future, to which an equitable defense may be interposed, if such an one is permissible; and it would be strange, indeed, should we find a court holding that such a defense could not be made, in view of the forty-ninth section just quoted.

The foregoing, it would seem, should be decisive of the

Points decided.

question; but it is said that in the case of *Stacy v. Abbot*, the district court came to a different conclusion. In that case the rule is stated as follows: "I conclude that in all cases arising under the laws of the territory, it is competent for the legislature to regulate the practice which shall obtain in the territorial courts, including chancery as well as common law cases."

This we deem a correct statement of the law. The judge of that court proceeds, however, to add that "the two jurisdictions can not be blended in the same complaint." This latter, however, was not an issue in the case, nor was it necessarily decided. It may, therefore, reasonably be deemed *obiter*, and we doubt very much whether Judge Cummins himself would feel bound by it as an adjudication of the question until after deliberation directed to that particular question, he had reached the same conclusions.

Our answer, therefore, is that the two jurisdictions may be blended in the same complaint, subject only to the condition that the different grounds of relief shall be distinctly and separately stated.

Cause remanded to the district court with directions to overrule the demurrer to the complaint.

GODFREY GAMBLE, RESPONDENT, v. DUNWELL,
ANKNEY ET AL., APPELLANTS. /

PRACTICE—APPEAL.—Upon an appeal from a judgment, without a statement or bill of exceptions, nothing can be considered but the judgment roll.

FINDINGS OF COURT.—When a court fails to find upon a question, that question can not be considered for the first time in this court, unless the finding is necessary to enable the court to render judgment.

IDEM.—*Hekl*, that all questions put in issue and not found upon by the district court would have been found against the appellants, or were deemed immaterial.

JURISDICTION—EQUITY.—The fact that the property is not within the jurisdiction of the court constitutes no bar in a court of equity, for a court of equity acts upon the person.

APPEAL from the first judicial district, Nez Perce county.

J. B. Rosborough, for the appellants.

Ainslie & Foote, for the respondent.

Opinion of the Court—Kelly, J.

KELLY, J. delivered the opinion, BOWERS, C. J., and MILLER, J., concurring.

This is an appeal brought from the first judicial district. The defendants had notice of the findings and judgment of the court below, but made no motion for a new trial. At the next term of the court they made an ineffectual effort to file a motion for a new trial, but the same was not allowed, and the case comes here on an appeal from the judgment of the court below, and nothing can be considered but the judgment roll. It is an equity case brought for the foreclosure of a mortgage upon personal property. The complaint alleges that Dunwell mortgaged certain personal property, then being on the Nez Perce Indian Reservation, at a way station known as the Twelve-mile House in Nez Perce county, Idaho territory. The complaint further charges that defendants, Nixon and the Ankneys, with the full knowledge of plaintiff's mortgage and his ownership in said property, and with intent to cheat and defraud plaintiff out of the same, conspired together, took and disposed of said property or a certain portion thereof, and hold or claim the residue thereof under a pretended sale from the defendant Nixon to the defendants Ankneys, and that said sale or pretended ownership of Nixon and the Ankneys is without any consideration whatever. The prayer of the complaint asks to have the defendants Nixon and the Ankney account to the court for the property claimed by them, and all property that remains be sold, etc., in the usual form of the foreclosure of a mortgage.

The defendant Dunwell allows a default to be entered against him, and the defendants, Nixon and the Ankneys, answer, and admit the taking and conversion of all the property, but deny that the plaintiff had any mortgage or ownership in the property, or that they had any knowledge of the same, or that they committed any fraud; and for a further answer, justify by saying that Dunwell and Nixon were partners, and owned said property as partnership property, and that the defendants Ankneys were creditors of said Dunwell and Nixon, and they bought said property of Nixon to pay said

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partnership debts. They make a further plea to the jurisdiction of the court, by saying that the said Dunwell had no right to grant, convey, or mortgage said property, and that the execution of said pretended mortgage did not convey any title to said plaintiff whatever to said property mentioned in plaintiff's complaint, for that the said premises are situated upon the Nez Perce Indian reservation, and therefore not subject or capable of being sold, granted, or conveyed, as alleged, and are not within the jurisdiction of the court. The court below found in favor of all the necessary allegations in plaintiff's complaint to charge the defendants in appeal, and against the denials and matters in avoidance set up in the answer, and that the defendants Ankneys had consumed, sold, and converted all of said property, or placed the same beyond the jurisdiction of the court, and rendered judgment against the Ankneys for the value of the property so converted.

It is contended by appellant's counsel that Dunwell and Nixon were creditors of the Ankneys, and that fact appears by the complaint. The complaint and answer, in this and some other particulars, are almost incomprehensibly drawn. The only allegation in the complaint is, that the Ankneys have a docketed judgment against Dunwell and Nixon for one thousand four hundred and five dollars. The answer says that they had this judgment entered, but entered satisfaction at the same time, so that in case their title to the property failed they could have satisfaction set aside; they claimed nothing under it. The complaint is filed nearly a year after the taking of the property by the Ankneys, and does not show when the judgment was docketed or anything further about their being creditors, and the court does not find when they became creditors, or whether they were ever creditors of Dunwell and Nixon.

We have already held, in the case of *Hazard v. Cole et al.*, that when the court fails to find upon a question, the question can not be considered for the first time in this court, unless the finding would be necessary to enable the court to render judgment. The court did find in this case that the Ankneys had full notice of the mortgage or sale to Gamble,

Statement of Facts.

and that Nixon had no title to the property, and that the Ankneys purchased the same without consideration. And this is sufficient to charge the Ankneys, though the property be in the possession of the mortgagor. For it must be held that all questions put in issue and not found upon would have been found against the appellants, or they were deemed immaterial. From the findings of the court below, it does not appear that the Ankneys had any title or right to the property more than any stranger. They took the property as trespassers under a pretended sale from Nixon. From the answer, and from the first, fifth, sixth, and seventh findings of the court, it would appear that the defendants in appeal relied upon the title of Nixon to them, and that Nixon's title grew out of an existing partnership with Nixon and Dunwell; and that the court had no jurisdiction in this, that the property was on an Indian reservation. Those findings are against the appellants, and of course, if Nixon had no title, he did not convey any to the Ankneys, and the absolute title being in the mortgagee, Gamble, he had to presume the property against the trespasser or fraudulent holder, or recover his judgment for the conversion. The fact that the property was not within the jurisdiction of the court constitutes no bar in a court of equity if the person is within the jurisdiction; for a court of equity acts upon the person.

For these reasons we must affirm the judgment of the court below.

Judgment affirmed. _____

THE PEOPLE, RESPONDENTS, v. SIMEON WALTERS,
APPELLANT.

CRIMINAL LAW—INDICTMENT—MURDER.—A failure to set forth the title of the action in an indictment is not fatal. The statute requiring it is directory. Sufficiency of an indictment for murder considered.

APPEAL from the district court, second judicial district, Boise county. The defendant was indicted for the crime of murder by a grand jury of Ada county. On defendant's application, the place of trial was changed to Boise county. The jury returned a verdict that they found the defendant

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guilty “as charged in the indictment.” Upon that verdict the district court sentenced and adjudged the defendant to suffer death. From that judgment the defendant appealed. No objection was made by the defendant’s counsel to the form of the verdict, in the supreme court, on appeal, and that question was not considered. After the affirmance of the judgment by the supreme court, and the issuance of a remittitur, other counsel for the defendant filed a petition for a rehearing in the supreme court, upon the ground that the verdict did not justify the judgment.

P. E. Edmondson, for the appellant.

George Ainslie, district attorney, for the respondents.

KELLY, J., delivering the opinion of the court. BOWERS, C. J., and MILLER, J., concurred.

The points relied upon are:

1. The indictment does not set forth the title to the action.
2. No venue is laid in the indictment.
3. The indictment does not appear to be found by a grand jury.
4. The indictment does not state facts sufficient to constitute a cause of action, in this: No offense is charged in the indictment. Appellant’s counsel contend that inasmuch as the two hundred and thirty-third section of the criminal practice act requires that “the indictment shall contain the title to the action,” the defect is fatal.

We do not think so. The indictment in this regard is directory. The two hundred and forty-second section of the practice act says: “The indictment shall be sufficient, if it can be understood therefrom: 1. That it is entitled in a court having authority to receive it, though the name of the court be not actually set forth.” The next section reads as follows: “No indictment shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon, be affected, by reason of any defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant.”

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It is not contended but the title to the court is fully set forth. How a failure to state the title to the action should prejudice the defendant's rights we are unable to understand.

2. The point that no venue is laid in the action is too narrow a construction of language for any court. "Idaho Territory, Ada County," is mentioned in the caption of the indictment and the title of the court, and again as the place where the jury is impaneled and sworn, and next the offense is specially charged to have been committed in "Ada county," and it is further charged that the offense is against the laws of Idaho territory, etc. In fact it is hard to see how the venue could be laid more specifically.

3. The point that the indictment does not appear to be found by a grand jury is likewise insufficient. "The jurors of the people of the United States of the territory of Idaho, in and for the body of the county of Ada, to wit: *i. e.*, good and lawful men of said county then and there being, duly sworn and charged to inquire for the people of the United States in the territory of Idaho and the body of the county aforesaid, upon their oaths do present, etc. Signed by _____, foreman of the grand jury."

"Presented in open court by the grand jury and filed in their presence," etc., is sufficient, and so held in numerous cases.

4. The objection "that no offense is charged" can not have any weight whatever.

"That Simeon Walters on etc., at etc., in and upon one Joseph Bacon, feloniously, willfully, and of his malice aforethought, did make an assault, and the said Simeon Walters with a certain knife, the said Joseph Bacon then and there being, feloniously, willfully, and of his malice aforethought, did strike, stab, and thrust, giving to the said Joseph Bacon then and there with the knife aforesaid, in and upon the body of said Joseph Bacon, one mortal wound, of which said mortal wound the said Joseph Bacon then and there instantly died." And so the jurors aforesaid, upon their oaths aforesaid, do say "that the said Simeon Walters, the said Joseph Bacon, in manner and form aforesaid, then and

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there, feloniously, willfully, and of his malice aforethought, did kill and murder.”

This language of itself can not be interpreted or tortured into anything but a charge of murder, and is good in a common law indictment. (*The People v. Cronin*, 34 Cal. 196; *The People v. King*, 27 Id. 507.)

The judgment of the court below is affirmed, with directions to the court below to fix the time for carrying the original sentence into execution.

THE PEOPLE v. SIMEON WALTERS, ON PETITION FOR
A REHEARING.

JURISDICTION.—After a criminal case has been certified back to the district court, the supreme court has no longer any jurisdiction over it, but all necessary orders must be made by the court to which it has been certified.

J. W. Huston and H. E. Prickett for the appellant.

George Ainslie for the respondents.

Opinion by NOGGLE, C. J., LEWIS, J., concurring.

At the March term of the district court for Boise county the defendant, Simeon Walters, was tried by a jury for the crime of murder, and found guilty as charged in the indictment. The indictment contains five counts, charging the defendant with the willful murder of Joseph Bacon. Before the trial, the defendant moved to quash the indictment; his motion was overruled by the court and he excepted to the decision. He afterwards demurred to the indictment; the demurrer was overruled and he excepted as before.

It is unnecessary for us at this time to state the grounds of the motion or the causes of the demurrer. The defendant, among other things, then requested the court to appoint a reporter, whose duty it should be to fully report the trial of the case; the request was refused by the court; after which the cause was tried and the defendant was convicted, as before stated. After the jury returned into court with a verdict of “guilty as charged in the indictment,” as aforesaid, the defendant moved the court to arrest the judg-

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ment, which was likewise denied by the court, to which decision of the court the defendant excepted. The court afterwards, and during the same term, rendered judgment and pronounced the following sentence upon the defendant, viz.: "And the sentence of the law is, that you, Simeon Walters, are to be taken from hence to the prison from which you came, and from thence to the place of execution, and then on Wednesday, the twelfth day of May next, between the hours of twelve at noon and six o'clock in the afternoon, you are to be hanged by your neck until you are dead, and may God, whose laws you have broken, have mercy on your soul."

From the foregoing judgment the defendant appealed to the supreme court, and the case was sent here and entered upon the calendar of this court at the adjourned term in May, 1869, only a few days after the appeal had been taken, and as yet being of the January term, 1869. The case was accordingly submitted to this court (as the defendant claims, against his earnest request for further time), and the judgment of the district court was affirmed, and the district court directed to carry out the said sentence. The January term of the supreme court has not yet closed. A petition for a rehearing is presented. Under section 491 of the criminal practice act, on page 298 of the laws of this territory, enacted at the first session, the judgment of the supreme court was entered in the minutes, and a certified copy of the entry was forthwith remitted to the clerk of the court from which the appeal was taken. It is also enacted in the same act, section 493, that after the certificate of judgment has been remitted as provided in section 491, the appellate court shall have no further jurisdiction of the appeal or the proceedings thereon.

The case having been remitted, the power of this court over the case is at an end.

The petition, therefore, for a rehearing must be denied.

This court has no power to make a rule for its practice, either criminal or civil, in conflict with the statute. The rule of this court, therefore, providing for a practice in conflict with the foregoing statutes can have no effect.

Points decided.

O. S. HAZARD, PLAINTIFF, v. THOMAS COLE, JR.,
ET AL., DEFENDANTS. /

FINDINGS—PRACTICE.—When no testimony is reported in a statement, from which this court can determine as to the propriety or impropriety of the findings of the court below, the presumption is that the testimony was, in every respect, sufficient to support the findings.

STATUTE OF FRAUDS—CHANGE OF POSSESSION.—The statute of frauds does not require personal property to be removed from the place where situated when sold. It does not in any sense refer to the place, but to the actual and continued change of possession.

RECORD, MATTERS OF.—In respect to matters of record in which two parties are interested, they are within the knowledge of both, and neither party has a right to rely upon the recollection of the other.

JUDGMENTS—IMPEACHMENT—FRAUD.—A judgment can only be impeached in equity for fraud in its concoction, and in no case for mere irregularity

JUDGMENTS—GOLD COIN.—A judgment for gold coin is not in any event void because it is so rendered. It may be irregular, but is then subject to modification only, either in the same court on motion, or on appeal by this court.

SHERIFF'S SALE—VOIDABLE JUDGMENT.—A purchaser at a sheriff's sale, under execution, upon a judgment which is voidable only, acquires a good title.

WAIVER—ACQUIESCENCE—PRESUMPTION.—What has been done and long acquiesced in until the rights of third parties have grown up thereunder, should be presumed to have been rightly done.

SHERIFF'S SALE—PURCHASER AT SHERIFF'S SALE.—A purchaser under execution does not depend for his title upon the fact or the regularity of the sheriff making such sale.

BILLS OF EXCHANGE—DAMAGES.—The language of the statute concerning the damages to be allowed upon protested bills of exchange clearly imports that it was not the intention of the legislature to restrict such damages to bills drawn by *one* person or corporation on another person or corporation elsewhere.

CERTIFICATE OF SALE—FILING—NOTICE.—The filing of a certificate of sale of real estate by the officer making the sale, and in the manner prescribed by statute, imparts to all the world constructive notice of the estate acquired by the purchaser under it, as well as the fact of sale and its legal consequences.

PRESUMPTION—JUDGMENT.—On motion for new trial, or on appeal, every intendment is in favor of the judgment or ruling of a court of record. The party complaining must show error affirmatively.

FINDINGS.—It is not a ground for a new trial that the findings were not filed until after the adjournment of the term of court.

CASE adjourned into the supreme court from the district court of the third judicial district, Owyhee county.

Opinion of the Court—Bowers, C. J.

Martin & Johnson and McBride & Henly for the plaintiff.

Rosborough & Preston, Scaniker & Burmester, Frank Ganahl, F. E. Ensign and S. A. Merritt for the defendants.

BOWERS, C. J., delivered the opinion of the court, KELLY, J., concurring specially.

This action was commenced in the third judicial district court, on a bill filed, in which is alleged several distinct grounds of relief, concluding with a general prayer, that the court, by its judgment and decree, may give such relief "as the nature of the circumstances of this case may require." Upon the trial the court below dismissed the bill, and gave judgment for costs in favor of defendants. Motion for a new trial was made. Upon the hearing of the motion in the court below, upon suggestion of the judge, counsel for plaintiff and defendants in open court consenting, the cause was adjourned to this court, under and in accordance with the terms and provisions of section 326 of the civil practice act, and the question is, shall this court advise and direct that the judgment and decision of the court below rendered on the second day of July, A. D. 1868, be vacated and set aside, and a new trial ordered? The case was tried before Judge Cummins, and the facts found by the court were:

1. That on the eleventh day of September, 1866, the defendant, the Lincoln Silver Mining Company, by its assistant treasurer, C. F. Balcom, at Silver City, thereunto duly authorized, drew its bill or draft for ten thousand dollars on its treasurer in Providence, R. I., payable at the latter place to said defendant Cole, in United States gold coin, in consideration of advancements before that time made by said Cole to said company, at Silver City, in United States currency, which amounted to that sum at the rate of about seventy-two cents in the dollar; and Cole afterwards, and before the nineteenth day of October, 1866, made further advancements to said company, in legal-tender notes, amounting to the sum of one thousand three hundred and eight dollars and ninety-five cents, at the rate aforesaid, for which said company agreed to pay Cole the said sum of one thousand

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three hundred and eight dollars and ninety-five cents, in gold coin; that said Cole caused said bill or draft to be presented to the treasurer of said company, in Providence aforesaid, for payment; the same was not paid, and was then and there protested for non-payment; that said Cole afterwards, and on the said nineteenth day of October, 1866, brought two actions against said company in the district court for said county, one on said draft and the other on said account, and caused the property of said company, consisting of a quartz mill and certain personal property, to be attached in said suits, and on the thirtieth day of October, 1866, recovered judgments in his said actions, respectively for the sums of twelve thousand six hundred and thirty-eight dollars and eighty-seven cents, including interest and costs and twenty-five per cent. damages on said draft or bill of exchange, and for one thousand three hundred and seventy-two dollars and twenty-five cents debt and costs, in both of which judgments was included a clause that they be paid and collected in United States gold coin.

2. That on the third day of September, 1866, said company was indebted to said plaintiff on account in the sum of seventeen thousand dollars for advancements before that time made by him to said company on like terms and rates as those by said Cole, and then agreed to make further advancements to said company to the amount of about three thousand and three hundred dollars, for which he gave his due bill to said company, and then and there received from said company, through said Balcom, a promissory note of said company, dated third of September, 1866, for thirty thousand dollars, payable in legal-tender notes at New York, on demand, to said Hazard, with interest at the rate of two per cent. per month; that said Hazard afterwards paid to said company the amount of said due bill, making the total of his advancements to said company twenty thousand and three hundred dollars, which was the consideration for said note, and the difference was added in order to make up the difference between currency and gold coin at that time in New York city, it being understood between the parties, as in the case of said Cole, that such

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advancements were made at gold coin rates; that afterwards, and before the nineteenth of October, 1866, said plaintiff made further advancements to said company, amounting to about one thousand five hundred and eight dollars and ninety-four cents, on account; that said Hazard on the nineteenth of October, 1866, commenced his action in said court against said company for said indebtedness; caused attachments to be levied on the same and other property of said company subsequent to those of said Cole, and on the thirtieth day of October, 1866, recovered judgment thereon against said company for the sum of thirty-one thousand six hundred and twenty dollars, to be paid and collected in currency, and the further sum of one thousand five hundred and eight dollars and ninety-four cents, to be paid and collected in United States gold coin, and for a further sum of two hundred and ninety-one dollars costs.

3. That by agreement of the judgment creditors executions were stayed on said judgments for sixty days, by entry in the record, for the purpose of giving time to said company to pay up and resume their operations.

4. That said company failing to pay up and resume their operations, said Cole, on receiving notice of the intention of said company not to pay up and relieve their property and prosecute their business, on the ninth of March, 1867, caused executions to be issued on his said judgments to the sheriff of said county, who thereupon, on the fourteenth of March, 1867, sold the personal property of said company, so attached, as aforesaid, for a sum sufficient to satisfy the smaller of his said judgments and costs, and the further sum of two thousand one hundred and forty-two dollars and forty-seven cents, which was applied to the other and larger judgment, and on the sixth day of April, 1867, sold the mill premises and appurtenances of said company for the sum of eleven thousand four hundred and thirty-five dollars and fifty-four cents, in full satisfaction of the balance due on said larger judgment. That said Cole at said sales became the purchaser of said mill premises and most of said personal property. That said mill premises consisted of a small amount of land in the vicinity of Silver City, with the

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mill, office, boarding-house, and other tenements pertaining to the establishment, all situate on the same lot; that said personal property (except a portion of the firewood designed for milling uses, which was one or two miles up the gulch from the mill, the balance, which was the larger portion thereof, being stacked on the lot near the office and mill) was some of it in the mill, some of it in the office, some of it in the boarding-house, and a lot of lumber on said lot. The weather being inclement and wintry the sale was held in the mill, and the sheriff, and also said Cole, announced to the persons present the property was open and free to inspection for any one desiring to bid, and all persons attending the sale had an opportunity to inspect the property if they desired.

5. That said Cole, on sale of said personal property, received possession of the personal property so bid in by him, hired a keeper to hold and take care of the same, and kept the possession of the same until he sold it to defendant Wilson in December, 1867; and the sheriff, on the sale of the mill property on the sixth day of April, 1867, filed in the recorder's office of said county a certificate of such sale, and delivered to said Cole a duplicate of the same.

6. That at the time of said sales, and for some time before and after, there was a great depression in the mining business and property in said county, as well as in other businesses, and a great scarcity of money, in consequence of which there was little or no demand for the kinds of property sold. No one of the several mills in the county were running, and no mines were yielding returns. That said Cole was the highest and best bidder for the property purchased by him at said sales, and no bidder offered any higher or better price therefor; that the executions on his said judgments were in their terms in accordance with the judgments, and they were read to the bystanders on the commencement of said sales without further announcement of the terms of sale.

7. That the attorney of said Cole who acted in procuring his said judgments, had no special or other powers from said Cole than such as pertain to the ordinary functions

of an attorney at law, in respect to the business of his client.

8. That there was no contract between the plaintiff and the defendant Cole, to the effect that plaintiff should forbear suing said company in consideration that Cole should give him the first information of the dishonor of his said draft for ten thousand dollars, and that Cole should give him such first information in consideration of such forbearance, and institute simultaneous action and obtain simultaneous attachments with said Hazard, but at most only a promise by said Cole at the request of said Hazard, that he would inform him of the fact of such dishonor in case that it occurred; which promise said Cole fulfilled by giving such information to Hazard on the night of its receipt.

9. That on the seventh of December, 1867, Cole obtained a sheriff's deed of said mill premises under said sale, and on the same day by deed conveyed the same to defendant Wilson, and at the same time sold and delivered to said Wilson the personal property so purchased by him, and said Wilson then and there entered into the possession of said property under said deed and sale, and still holds the same.

10. That at the time of his purchase from said Cole, defendant Wilson had no knowledge of any claim, demand, or alleged equity of said Hazard, except that he was a judgment creditor of said company, subsequent to said Cole.

As conclusions of law applicable to the facts aforesaid, the court found:

1. That plaintiff has established no equities that would entitle him to the relief sought, or to any relief which this court could give.

2. That the judgments of said Cole were valid subsisting judgments, and that the sales thereunder were valid; at the most, they were merely irregular, so far as the clause requiring the same to be paid and collected in gold coin, and which irregularity might have been corrected by application to the court in which said judgments were rendered, or in the appellate court.

3. That no application or showing having been made by any party in interest to the court in which said judgments

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were rendered, to correct said irregularities, or to set aside the sales made thereunder or by virtue thereof, that said defendant, John M. Wilson, acquired a good and valid title to said personal property and real estate purchased by him of said Cole on the seventh day of December, 1867.

4. That there was no fraud in the judgments or sales thereunder, and this court does not find grounds in the alleged inadequacy of price to disturb the sales.

5. It results that the defendants are entitled to judgment against the plaintiff for their costs, and it is so ordered.

As appears from the statement, the motion for a new trial is based upon two general grounds: 1. Insufficiency of the evidence to justify the decision of the court, and that such decision is against the law. 2. Errors in law occurring at the trial and excepted to by the plaintiff. No exception was taken to the first, second, third, fourth, sixth, seventh, eighth, or ninth finding of fact. The only exception to findings of fact which is shown in the statement, is to the fifth and tenth, but in an assignment of errors and exceptions, signed by plaintiff's attorneys and filed as a paper in the case, after having been served upon defendant's attorneys (which, however, has no certificate of the judge who tried the case attached to it showing its correctness), the tenth finding is excepted to as well as several exceptions for failure to find, etc.

Upon the argument, counsel on each side took an extensive range, pressing the consideration of their respective views touching each particular fact as found by the court; and while we do not desire that it shall be considered as a precedent in future cases, we propose to consider the case upon this basis, as argued, and it is sufficient to say of the several findings numbered respectively first, second, third, fourth, sixth, seventh, eighth, and ninth, that no testimony is reported in the statement from which this court is able to determine either as to their propriety or impropriety, and we consider it well settled that in such case this court is bound to presume that the testimony was in every respect sufficient to support the findings. The testimony in reference to the fifth finding appears in the statement, and it is

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insisted by counsel for plaintiff that it is insufficient to support the same. Springer, the sheriff, testified that the sale was made by his deputy, himself not being present.

Ezra Mills testified: "I was deputy sheriff in March, 1867. I made the sale of the personalty March 14, 1867. On the same day of sale I made a bill of sale to Cole, and put him in possession."

Thomas Cole testified: "At the sale I received a bill of sale of the personalty bought by me, and the same time received possession of it. I moved over there, boarded and slept there, and kept personal supervision and possession of the property until I went below, when I hired and paid a man to take and hold possession of it for me until I came back. I kept possession of it from the time bought until I sold the property to Wilson."

In addition to the above it also appears that Cole afterwards sold a large portion of the personalty and delivered it to Wilson. The foregoing is extracted from a large mass of testimony directed to this point, and appears to fully support the finding of the court, unless the questions and considerations of law urged by plaintiff's counsel shall have the effect to render such proof of facts inapplicable to this case.

The testimony shows that the personalty was sold on the premises of the Lincoln mill company, against whom the execution ran, and that after the sale and purchase thereof by Cole, the property was left upon the same premises, and it is insisted that this being true, there was no such actual and continuous change of possession as is required by the fifteenth section of the "act concerning fraudulent conveyances," which provides that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the thing sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the creditors of the person making such assignment, or subsequent purchaser in good faith."

[It is urged that while there can be no question as to the

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gle reason why it is not supported in every particular by the evidence.

Hazard and Wilson appear to have been the only witnesses examined upon the questions involved in this exception, and did it appear that the testimony of these two stood one against the other, in their statements conflicting, the rule clearly is, that we should hold the finding supported. But upon examining the testimony, we find that Wilson swears positively that he had no notice except such as the record gave him, and Hazard says nothing about notice. Objection and exception is also made to the findings of the court in this, that the court omitted to find a fraud upon Hazard, for that Cole admitted to Hazard and others, that the time for redemption did not expire until the month of December, 1867. We are unable to see how such finding was material or in what manner it could have affected the ultimate conclusion. The testimony upon this point is meager and unsatisfactory. But if it be conceded that a finding upon the fact complained of would have been as claimed by counsel, there is no tenable ground for designating it a fraud. The time at which the right to redeem expired was ascertainable in the office of the recorder of the county, and was equally within the reach and knowledge of both Cole and Hazard, and neither party had a right, or was in any manner justifiable in relying upon the recollection of the other.

Exception is also made, that the court omitted to find that the defendant Wilson entered upon the premises under a lease from the agent of the Lincoln silver mining company with the knowledge of Cole, and that he held the same under such lease until December, 1867, Cole consenting. There is no force in this objection. It can make no difference by what terms Wilson held the premises before purchasing, though it had been by brute force, the only material question being, did he obtain the title by his purchase? This having been answered in the affirmative by the court, such finding as is asked could not affect the case.

The statement shows only a single exception to have been

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made to any ruling of the court during the progress of the trial, and that is as follows: "Plaintiff also assigns as error the refusal of the court to admit in evidence the amended judgment of plaintiff, to which ruling plaintiff excepted on trial." There are, however, six assignments of error contained in the paper hereinbefore referred to, to a part of which reference is made in the statement in the following words: "The court erred in the third, fourth, fifth, and sixth exceptions to conclusions of law and assignments of error on file and served." The first of these objections has reference to the facts as being insufficient to support the conclusion, and has already been considered. The second, third, fourth, and fifth are directed particularly to the character of Cole's judgments, as being void, irregular, insufficient to support the sheriff's deed and to carry the title, and fraudulent, and may well be considered together in what we shall have to say as to said judgments.

It seems to be conclusively settled, that a judgment can only be impeached in a court of equity for fraud in its concoction. It is also said, on the highest English authority, approved and adopted by Kent and Story, that there is no case in which equity has ever undertaken to question a judgment for irregularity. (2 Story Eq., sec. 1575, note 1; 3 Johns. Ch. 275; 4 Id. 85; 6 Id. 234; 20 Johns. 677; 7 Cal. 443; 34 Id. 301.)

The complaint in this case charges no fraud in obtaining the judgments sought to be set aside, except the general allegation that they were obtained in fraud of the plaintiff's rights. It is urged that the judgments were void, in that they were rendered for gold coin. They were not void. The most that can be said of the judgments on this ground, in any event, is, that they were irregular, and might have been modified on motion in the same court, or on appeal by the appellate court. (*Betts v. Butler*, ante, 185; 2 Nev. 100; 27 Cal. 100, 496.) While a sale under a void judgment passes no title, if the judgment is merely voidable for irregularity the sale is good. (8 Cal. 568.) A purchaser at sheriff's sale under execution issued upon a judgment which is voidable only, acquires a good title. (1 Cow. 622.)

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In *Hastings v. Burning Moscow*, 2 Nev. 100, it is expressly held that a sale on a judgment and execution for gold coin was valid, and passes the title; but the court says that upon motion or on appeal and modification of the judgment, where the judgment creditor purchased the property sold, and still holds it, the court will set aside the sale. The reason for this rule is given by the court in *Reynolds v. Harris*, 14 Cal. 667, thus: 'The judgment creditor still has his judgment, and it works no injury or loss to him, but in case of a stranger purchasing at the sale, or from the purchaser, after he obtains a sheriff's deed, he can not be remitted by the court to his former position. The court says: "If upon reason and authority the questions decided in this case were left in such extreme doubt, that we might well incline to the one side or the other, considerations of public policy would impel us to solve the doubt in such manner as to promote the repose of titles held under judicial sales, rather than by technical niceties to overthrow them."

In view of the reasoning of the supreme court of California it may be said that if either defendants or creditors have the right to come into a court of equity and impeach and set aside judgments at law and sales thereunder, on the ground that the judgments and the process thereunder contained a clause for their collection in gold coin, the direct effect would be to unsettle titles to a large portion of property within this territory, and to ruin hundreds who have reposed confidence in judicial sales, and paid valuable considerations for titles thereunder.

Far better would it be upon reason, and we think it to be well settled upon authority on the doctrine of waiver and acquiescence, to hold that what has been done and long acquiesced in, until rights of third parties have grown up thereunder, should be presumed to have been rightly done. All mere irregularities may be waived; besides, in all these cases of judgments with specific clauses for gold, gold dust, or gold bars, when they have been satisfied by sale, and titles thereunder have accrued to third parties, the judgment upon the doctrine of waiver should in each case be considered the law of the case, and an attempt to impeach

such judgments and sales is as void of merit as if the debtor had paid such judgments without sales; for in effect it is then nothing more than a payment of the judgment.

Having said this much upon the theory that the judgments in this case sought to be set aside are irregular, because of the gold-coin clause contained, it may be well questioned if such clause be an irregularity.

In December, 1864, the legislature of this territory passed what is commonly known as the Specific Contract Act, which act was uniformly enforced until January, 1868, when its validity was questioned for the first time. And this court, as then constituted, held the said act void, as conflicting with the act of Congress, making the promise of the United States government a legal tender, etc., and while this court would not have been the first to disregard such decision, it is asserted that the supreme court of the United States, in a recent decision (which we have been unable to examine), have in substance and effect overruled it; but as this view of the case was not presented by counsel, said decision not having been issued at the time this case was argued, we are not satisfied to base our decision upon the point first made.

Some objection is made by plaintiff that there were two sales, and that the sheriff's return is defective, etc. It is sufficient to say of this objection, that a purchaser under execution does not depend for his title upon the return of the sheriff. (12 Cal. 133; 4 Wend. 506; 1 Cow. 623; 8 Cal. 186; 4 Id. 47; 4 Wheat. 506.) In this latter case, it was held that it mattered not what return the marshal made, or whether he made any return at all.

It is insisted that inasmuch as the draft which was the foundation of the larger of Cole's judgments against the Lincoln silver mining company was drawn by one agent or office of said company in this territory on another agent or office of the same company in Rhode Island, it was not in fact a bill of exchange and, as a consequence the addition of twenty-five per cent. to said judgment as damages under the act of this territory was fraudulent, and rendered the

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judgment void. We regard the better rule to be as laid down by Parsons (vol. 1, p. 62), that such a draft may be treated as either a bill or a promissory note.

In addition, by express provision of the act of January 11, 1866, damages are allowed on "bills drawn or negotiated in this territory, on any person or company," etc., which language, as we think, clearly imports that whatever the general rule may be, the legislature of this territory did not intend a restriction to bills drawn by one person or corporation, etc., here, on another person or corporation, etc., elsewhere. Nor do we, in any event, well see how such thing could be considered a fraud, such as to invalidate the judgment. If the question was raised, or in any manner became an issue on the trial, it must have been ruled upon in some way by the court, and so became a judicial determination of the matters involved, and if erroneous, should have been excepted to, and corrected in the appellate court.

Much stress is laid by counsel in the argument, and some testimony reported in the statement, on what is termed Hazard's right to redeem the property sold under Cole's judgments, he being a subsequent judgment creditor, and upon the further fact, as alleged, that two certificates of sale were filed with the recorder. We are ill prepared to admit that this question is in any wise entitled to our consideration, for the reason that the complaint is in no sense a bill to redeem, nor does the testimony show any offer to redeem within any known rule of law. We may, however, remark that the filing of the certificate of sale by the officer making the sale in the manner prescribed by statute was intended to impart, and did impart, to Hazard and to all the world, constructive notice of the estate acquired by the purchaser under it—notice not only of the fact of sale, but of the legal consequences. (31 Cal. 312, 313.)

The filing of the certificate imparts notice of certain facts, and the sequence of these facts is a question of law, and a mistake thereunder is at one's peril. Hence any statement which may have been made by McQuade, Cole's attorney of record, as to what Cole claimed, or what were his rights in the premises, can matter not. Hazard was bound, under

the rule just stated, as matter of law to know these things, and if he, as matter of fact, did not know, McQuade, Cole's attorney was perhaps not just the best person from whom the required information should have been sought.

There is nothing shown in the statement whereby it can be seen that the court erred in excluding the amended judgment offered in evidence by plaintiff.

On motion for a new trial, or on appeal, every intendment is in favor of the judgment or ruling of a court of record. The party complaining must show error affirmatively. It does not appear from the statement what the judgment or the amendment was; nor in what court; nor against whom it was rendered; nor that it was in any wise material to any issue in this case; and as a consequence of this, it does not appear that any material right was affected by the ruling complained of. In such a case the exception must be disregarded as immaterial. No error being shown, the ruling excluding the proffered testimony is conclusively presumed to be correct. (10 Cal. 267.) Nor is it ground for a new trial that the findings were filed after the adjournment of the term. They were filed within ten days after the trial, which is all that is required by the statute.

In conclusion, we do not hesitate to say that the facts found by the court are fully supported by the evidence, and are ample as a predicate to support the judgment. The omissions to find we have shown to be immaterial, as affecting no substantial right. We are unable to see any basis upon which it might be supposed that a new trial would result in any manner different from the former trial, and where such is the case a new trial will not be granted. (1 Cal. 213; 6 Id. 26; 1 Id. 285.)

The motion for a new trial must be denied and the judgment of the court below affirmed, and it is so ordered.

In passing upon this motion, we have considered it generally, and in so doing have passed upon several questions which it is insisted by counsel for defendants were not properly before the court. Consequently we consider it advisable to suggest that the proper practice to be adopted in the future on motion for new trial and on appeal is to

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incorporate into the statement or transcript, as the case may be, every question of law or fact which the court will be called upon to consider.

Motion for a new trial denied. Judgment affirmed.

KELLY, J., concurring:

The basis of this suit is laid upon the ground that the plaintiff, and defendant Cole, before the commencement of their said actions entered into a mutual agreement whereby they were to commence simultaneous suits and make their liens mutual and share *pro rata* in proportion to their respective claims by reason of the issuing of their said attachments, *i. e.*, that one should not be superior or stand preferred before the other. The court on the trial did not find the proof sufficient to support these allegations in the bill. No exceptions were taken, and counsel admit that they failed to show the several frauds in this regard.

The second and most potent ground which the counsel for plaintiff raise for setting aside the judgments of defendant Cole is, that said judgments were rendered for gold coin; that executions issued for gold coin only; that bids were not received in any other kind of money, and such proceedings were a fraud upon plaintiff's rights and equity of redemption.

Since we have had this case under consideration, the supreme court of the United States have decided the question in favor of gold-coin judgments, and we are bound by that decision.

The third ground of complaint is, that Cole's judgments were obtained upon domestic bills of exchange drawn by the Lincoln gold and silver mining company, in this territory, upon their house in the state of Rhode Island, and that twenty-five per cent. damages are taxed up in said judgments.

We do not think this point is well taken. The rule is well laid down in 1 Parsons on Notes and Bills, p. 632. He says: "It is not absolutely necessary that the drawer should be a different person from the drawee; for it is very common for a man to draw upon himself; and it has long

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been held that such an instrument is a good bill of exchange. The same principle applies when partners carry on business at two different places, and one establishment draws a bill on the other. So, when a duly authorized agent or officer of an incorporated company draws in behalf of the company upon the treasurer, cashier, or other officer of the company who has the control of or is charged with the duty of disbursing the company's funds. This is in substance, it should seem, a draft of the company upon itself, and may be treated either as a bill of exchange or a promissory note; and it is a general rule that when it is doubtful whether the instrument is intended as a bill of exchange or a promissory note, and it possesses the requisites of each, it may be treated as either, at the option of the holder."

The fourth ground of complaint by plaintiff is, that the defendant Cole, not only taxed up the twenty-five per cent. damages, but he also charged the interest on said bills of exchange, and taxed the same in his judgments. This is undoubtedly true, and would on motion, at the proper time, have been corrected by the court, and modified or reduced the judgment about eighty dollars, or if the court had refused to modify the judgment in this particular, such refusal would be good ground for assignment of error on appeal. It was a mere irregularity, and can not be attacked for the first time by a bill in equity, either by the defendant in the case or by a judgment creditor. The bill must show some fraud in the concoction of the judgment. There is no fraud contended for on this point, and it is doubtful whether the district court would have the right to correct its own judgment in such cases after the adjournment of the term. It is not probable that this error was discovered by anybody until Hazard had made his ineffectual attempt to redeem the Lincoln mill property; for he had contracted to Cole's judgments, and would not have considered any fatal error in the entry, or any conviction of fraud in a judgment that he desired to purchase.

The next or fifth ground of complaint in the order in which I am considering this question is to the fifth finding

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of the court. The finding is as follows: "That said Cole, on sale of said personal property, received possession of the personal property so bid in by him, hired a keeper to hold and take care of the same, and kept the possession of the same until he sold it to defendant Wilson in December, 1867; and the sheriff on sale of the mill premises on the sixth of April, 1867, filed in the recorder's office of said county a certificate of such sale, and delivered to said Cole a duplicate of the same."

The delivery or possession of the personal property purchased by Cole at the sales, or any fraud in that particular, are not complained of in the bill filed by the plaintiff. But inasmuch as the court found upon this question, upon proof submitted at the trial, and now made a part of the statement, and in view of the able arguments of counsel and the importance the plaintiff attaches to this question, we have carefully considered the evidence submitted and do not find sufficient ground to overrule the opinion of the court as to this finding, or set aside the judgments on this ground. If there can be anything said in addition to what the chief justice has said in support of the possession claimed by Cole, it may be put upon the ground that Hazard was cognizant of, and consented to, Cole's possession, and the manner that he took and held the property. Webb swears that he bought some articles of personal property at the sales of the fourteenth of March, 1867, but at request of Cole and Hazard he did not take them away, but left them there under an arrangement with Hazard and Cole, so that the property might be kept together. Three days prior to the fourteenth of March, Cole and Hazard entered into a mutual agreement in writing for Cole to proceed and sell the property on his executions. The substance of the agreement was that the property should not be sacrificed; that Cole should be the purchaser if necessary, and turn it over to Hazard, by Hazard's paying Cole the amount of his judgments. The meaning of the contract was that Hazard, on paying Cole the amount due him with costs, he, Hazard, should be subrogated in law and equity to all the rights

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of said Cole in every respect whatever in reference to said judgments and the property purchased at said sales.

It is true Cole was to sell the property according to law. Hazard, then, was interested in the title that Cole might obtain on his sales upon execution. Now, if Cole had committed a fraud or such a mistake in conducting the sales, then Hazard would have good ground to complain. He might seek his remedy in an action at law upon his contract, or if the property was still in the hands of Cole, he might ask to have the sales set aside. But, suppose that Hazard had been a party to the fraud. It could not be contended that he would be entitled to any relief. Hazard, although a witness on the stand, in his testimony now before us does not deny Webb's testimony that he had agreed with Cole that the personal property should be kept together on the premises, nor does he testify but what Cole, either by himself or his agent, had continued control of the property.

I do not take it that either party committed any fraud, and of course Hazard could not have participated in any. But let us see what relation Hazard stood in, and how he treated these sales. Hazard was at the sales and saw how they were conducted. He was several times on the premises, and swears that he had meetings there with the defendant, Wilson, in regard to Wilson's purchasing the property before he did make a purchase. He said, or must have known, that Cole had hauled the one or two hundred cords of wood from Long Gulch, and stacked it with the property or wood on the premises. He knew the character and dominion that Cole exercised over the property then, as well as he does now. He had, or at least he should have had, as much anxiety to make his money on his judgments as he has at any time since. If Cole did not have full and complete possession of the property and a valid title, why did Hazard stand by with his executions in his hand and refuse or neglect to levy? The fact is, Hazard treated these sales as valid and sufficient. Can it be supposed that if Hazard had performed his contract with Cole for the purchase of the property which he was endeavoring and so

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anxious to fulfill, Cole's dominion over the property was such that he could not deliver it over to Hazard, and if he did deliver it over no good and sufficient title would pass? Hazard did not so consider it, but on the contrary he stood by with his executions in his hand and assented to the proceedings that Cole had had under his executions by offering to purchase. For these reasons he ought not to complain of the character of possession which he assented to, and which could in no way injure him.

The next and last ground of complaint is the two sales of the real property made by Cole on his executions. It is contended by the plaintiff that these sales were a fraud upon his right of redemption. It appears that the first sale was made on the sixth of April, 1867. The time for redemption on this sale would run out on the sixth of October, 1867. The second sale was on the eighth of June, 1867. The time for redemption would run out on the eighth of December, 1867. The only return on these executions is made upon the last sale or alias execution.

"Cole says that he relies upon the first sale; that the last sale was made by his attorney, McQuade, in his absence, without his advice or authority." "Hazard says that Cole told him the last of August or first of September that his time for redemption would run out about the first day of December. I told him I thought I had sixty days more in addition to redeem in. He seemed surprised, but seemed to be satisfied. I found by conversation with Judge Miller that I did not have the sixty days to redeem in. When I came back from San Francisco I went to the recorder's office to see the exact time in which to redeem. I found two certificates of sales. McQuade, Cole's attorney, came into the office, and I asked him if he had collected any more money for me. He first refused to answer; then he said he had not. I then said, here are two certificates of sales. He said, that makes no difference; you will find the return was made under the alias execution and your rights have been preserved. We claim under the last sale. Next morning I met him there again, and he said, we claim under both sales; if the first is not good, the last is. In consequence

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of the last sale I never paid Cole according to the written agreement made before the first sale."

Cole told me he did not expect I would. On the twenty-seventh day of November I tendered Cole nine thousand five hundred and eighty-two dollars legal-tender notes in redemption of the Lincoln mill property. He said in reply to my tender that his judgment was for gold coin, and that he would not take greenbacks; made no other objection to the tender. Martin Heman and E. H. Clinton, witnesses introduced by Hazard, testified in regard to the tender in substance the same as Hazard. Heman testifies that "Cole said to him that he would not take greenbacks, but if Hazard had tendered him coin, or greenbacks at coin rates, he would have taken it."

Now, if there was any fraud in these sales, or in consequence of there being two sales, and that fraud operated upon the rights of Hazard, and defendant Wilson was cognizant of or a party to the fraud, his purchase can not be protected, for the sales ought to be set aside. In the first place, can two sales be made of the same property for the same debt, without committing a fraud? It sometimes happens, though we trust not often, that the preliminary proceedings of a sale, such as giving the requisite time or the manner of writing notices or posting the same, or the place and manner of conducting the sales, are wholly insufficient and not in accordance with the law, and the sale for that reason is invalid or void. Or suppose the legality of the sale may be doubtful, all of which is done without any fraud or intention of fraud, can the party proceed to make a second sale without applying to the court to set aside the first sale? Or suppose the second sale is made by mistake or without authority, does it vitiate the first sale so as to call for the aid of the court? If one of the sales were invalid and the other good, then the court could not aid the case, for the invalid sale would be no sale at all. But suppose that both sales were good so far as the proceedings can be determined; then the first sale would certainly be good, and the party might rely upon it even after the second sale had been made, did it not actually mislead or work an injury

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to the judgment debtor or judgment creditors. It might be the better practice to apply to the court and there first determine the validity of the sales, and set aside the doubtful one, instead of taking the responsibility without the aid of the court. But such determination of the court would add nothing to the validity of a valid sale or impart any better notice to the redemptioner than any legal sale gives without such determination. Hence, we must conclude that two sales might be made, and if either were good, such sale should not be set aside merely because there were two sales.

The ground raised by plaintiff's counsel, that there being no return made by the sheriff on the first execution, and a return having been made on the second or alias execution, invalidates the sale under the first execution, is not well taken. My associate has shown in his opinion that a return may not be made at all, and still the sale may be good. The authorities are decisive on this point, and it must be so held when there is no fraud in the transaction.

We will now consider how Hazard treated these sales. It is not contended that there was fraud practiced in making the sales, or that there was anything wrong, except in the fact that there were two sales. Hazard says he should have performed his agreement with Cole if he had not discovered that two sales had been made. This can not be, for by his own testimony he swears that the first time he discovered that two sales had been made, "was when he was in the recorder's office about the last of August or first of September, 1867," when the terms of his agreement with Cole show that he should have performed certain conditions therein by the first of July, 1867, two months prior to the time that he discovered the two sales.

Admitting the facts as Hazard states them, by his own observance of the record, that the time for redemption on the first sale ran out on the sixth day of October, 1867, and the time for redemption on the second sale would be on the eighth of December, 1867, could he be deceived in regard to his rights? He complains that Cole told him his time for redemption would expire about the first of December. But he admits that he saw the record of the two sales, and

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that Cole told him about the same time that he claimed under the first sale. From the time that Hazard says he first discovered that the two sales had been made until the time for redemption under the first sale, nearly forty days had intervened. But Hazard does not pretend he made any effort or offered to redeem during this time. On the twenty-seventh of November, 1867, about the time of redemption under the last sale, he offered to redeem by tendering greenbacks, which Cole refused because they were greenbacks, but offered to allow him to redeem if he would pay coin, as his judgments called for. Three months elapsed from the time he discovered the two sales, and Cole told he claimed under the first sale up to the time of his offer to redeem, and during this time Hazard and Cole and Hazard and Wilson were frequently together, and Hazard continually trying to buy or sell out to one or the other of these parties, and did not complain of any deception or fraud in the sales. But when his efforts to purchase had failed, he offers to redeem if Cole would take greenbacks.

Now, did Hazard at that time suppose he would obtain a good title to the property by redeeming from Cole? Did he suppose the sales were valid and his title would be good against the Lincoln mill company and against other judgment creditors? Most certainly he did. No better evidence could be given of this fact than his offer to pay over nine thousand dollars for the property and accept such a title as Cole had acquired under his execution sales.

It is true Cole sold the property to Wilson two or three days before the time for redemption would run out on the last sale. But of that there can be no complaint, even if Cole had claimed under the last sale, or if Hazard had a right to redeem therefrom. He must make a good and sufficient offer to redeem, one which Wilson (or Cole for Wilson) would be bound to accept, and unless he did make such offer and the offer was refused, he was not defrauded or prejudiced by the sale.

From the whole history of this case we are led to believe that there was no intention to deceive, and that Hazard was not deceived in the manner or mode of making the sales,

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but on the contrary he knew all the facts, and all the time relied upon a hope to buy Cole or sell his interest to Cole or Wilson, or upon his right to redeem in greenbacks.

However great may be the burden to the plaintiff, or however strong his appeal for equitable interposition, he has not laid or relied upon any substantial ground for relief, and his accumulation of seeming grievances is swept away the moment he fails to show that actual fraud has been committed.

ON PETITION FOR A REHEARING.

LEWIS, J. It is, perhaps, well settled that this court will not grant a rehearing in a case like the one at bar, unless it is probable that a different decision from the former would be made. It seems that in California, from whence the civil practice act and whole judicial system of this territory have been taken, and the decisions of whose courts are generally relied on as good law, has adopted and declared the rule in that state to be, that a rehearing will not be granted with the same indulgence as formerly. (7 Cal. 330.) And while this court will at all times be willing to correct any errors it may commit, yet in the present case we will not disturb the action of the court as formerly constituted unless manifest error has been committed.

And in the consideration of this petition it of course becomes necessary to examine to some extent the merits of the case looking at the bill, the answer and the facts, taking, however, the facts as found by Judge Cummins. The basis of the whole proceeding is a contract alleged by the plaintiff to have been made between himself and the defendant Cole; that they should simultaneously commence suits by attachment, against the Lincoln mining company, in the event that a certain warrant in Cole's favor, drawn by an officer of the company upon the treasurer thereof, at Providence, Rhode Island, was protested for non-payment, or any other drafts upon the treasurer of the company were dishonored; he, Cole, being agent of the express company, had made such arrangements that he would have the first information of the dishonor of any drafts on the company. It seems,

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also, that at the time of this alleged contract, both plaintiff and Cole knew that the Lincoln silver mining company was largely indebted to sundry laborers, mechanics, merchants, and business men, who were urgent in their demands and threatened suits upon the first rumor of the dishonor of any such drafts.

The effect of the contract was this: the means of information possessed by Cole as express agent were to be used by Cole and the plaintiff to secure the amounts due them from the Lincoln company, by the attachment of its property, while the laborer and business man were "to be squeezed out," as it were. Now, the court below finds that there was no such contract. The old equity maxim, "that he who seeks equity must do equity," as also that a man must come into a court of equity with clean hands, applied to the alleged contract in this case, would not entitle the plaintiff to the relief sought, had he succeeded in establishing the contract. It is true that the parties might lawfully make such a contract, but if, after it was made, one should disregard it and secure himself first, equity would not interfere, but leave the parties to their rights at law, for the parties would only be placed in the same condition in which they by their agreement sought to place the other creditors.

It is also well established, that when a party has once had a plain, adequate remedy at law, and by his own laches loses it, equity will not relieve him. A court of equity will not encourage negligence, but will insist that every man take advantage of his legal rights at the proper time. The plaintiff herein had a plain simple remedy at law—the statute gave him the right to redeem. Had there been any question as to the amount to be paid, or the kind of money, the court would have saved his rights and determined the sum. But this is not a bill to redeem. The court below finds that the real estate in question sold for eleven thousand four hundred and thirty-five dollars and fifty-four cents. There is nothing to show that any such sum was tendered or offered, in accordance with the statute.

The judgments of Cole were in no sense void, but merely irregular, and would have been corrected on motion in the

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proper court by the defendant, or on a bill to redeem by a creditor.

The rights of the plaintiff in this case are no greater than those of any judgment creditor. He had the right to redeem. The law gave him the right, and the court would have awarded it. In addition to the rights given him by law, Cole entered into a special contract with plaintiff, declaring the sum at which he might redeem, and plaintiff agreed to pay such sum. Looking at the whole case, we are of opinion that the conclusion of Judge Cummins, that there is no equity in the bill, was correct.

It is especially found by the court below that there was no fraud in the judgment or sale thereunder. We think that so far as the records in this case disclose the facts, Cole acted in entire good faith, his sole object being to secure his claim. The plaintiff, in addition to his statutory rights, had a written contract with Cole as to the sum to be paid and the time of payment. What act has Cole done that is inequitable? We have shown that equity ought not to enforce the contract claimed to have been made, and on which this bill is founded.

We will not in detail examine the points made by the plaintiff in his petition for a rehearing, but briefly refer to some of them. As to the question of practice in filing the finding after the entry of judgment, in the case at bar the objection is merely technical; it has worked no injury to the plaintiff. Whether the check or warrant on the treasurer of the company was, within the meaning of the statute, a bill of exchange, we think is of no moment in this case. We might hold it not to be such, and yet it would make no difference in the determination of this case.

As to the opinions of the attorney of Cole and statements of Cole himself, as to which sale he claims under, it can be of no moment; there could be but one valid sale, and the plaintiff was bound to know the law in that regard. And, as we have before suggested, the rights of the plaintiff would have been saved and protected by the court, and an adjudication would have been made as to which sale was legal, and the sum required to redeem would have been declared.

Opinion of Lewis, J., on Motion to Modify the Judgment.

This is one of those unfortunate cases involving a large amount of property—wherein the plaintiff has slept upon his rights till they are gone, and then seeks the aid of a court of equity to restore him to the rights that the law had given him and by his negligence he had lost.

We have carefully scrutinized this case, hoping to be able to afford the plaintiff some relief—indeed, we were anxious to do so; but from the whole case we are satisfied that there is no equity in the bill; hence the motion for a new trial was properly denied, and the petition for a rehearing will be overruled.

Rehearing denied.

NOGGLE, C. J. I concur.

ON A MOTION TO MODIFY THE JUDGMENT OF THE SUPREME COURT.

LEWIS, J. This cause has been argued by counsel and submitted to the court on the motion of plaintiff to modify the order issued herein, of the eighteenth of May, 1869, and to order the clerk to transmit the papers on file to the court below.

This cause came on to be heard in the district court for Owyhee October 22, 1868, and was submitted to that court on motion for a new trial, and on motion of the district court the motion of the plaintiff for a new trial was adjourned into this court under the provisions of sec. 326 of the practice act.

On the twenty-first of January, 1869, this case came on to be heard in this court on the motion of plaintiff for a new trial. The said motion was argued at length and was submitted to and taken under advisement by this court February 3. On the fifteenth of May the opinion was announced and judgment entered herein denying the motion remanding the case. On the seventeenth of May the clerk was ordered to transmit the papers to the court below. On the eighteenth of May, on motion of counsel for defendant, the judgment of this court was modified so that this court not only denied the motion for a new trial, but also affirmed the judgment of

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the court below. On the same day a *remittitur* was issued accordingly. On the twenty-second of May the order to the clerk to transmit the papers to the district court was vacated, and of the same date it was ordered that *remittiturs* in all cases decided at this term of the supreme court be issued on payment of the clerk's costs.

The above is the status of this case as we glean from the records herein.

The questions to be determined by this court, then, are:

1. Ought the said order be modified?
2. Has this court the authority to modify the same?

This court has no original jurisdiction in this case, and only acquired jurisdiction in pursuance of sec. 326 of the Practice Act.

That act, among other things, provides "that all questions of law arising on motions for a new trial in the district court may be adjourned into the supreme court for decision, and the supreme court may give judgment or remand the case."

We are of opinion that all cases that are brought into this court under the extraordinary provisions of this section, which serves to empower a district court to transfer parties litigant to this court without even saying "by your leave," should be determined solely upon the questions adjourned here for decision.

The case at bar was submitted to the district court on the plaintiff's motion for a new trial. The question then pending was: Shall a new trial be ordered or denied? That was the only question adjourned into this court for decision, and this court had no authority or jurisdiction to hear and determine any other question. The latter clause of section 326, "or may make any order according to the justice of the case," in our opinion has no application to the case at bar. This court then having disposed of the only question before it, to wit, the motion for a new trial, could go no further, and we are satisfied that this court as formerly constituted were of that opinion, as evidenced by the order made herein of May 15; and the order of May 18, being made without authority, should be revoked.

Opinion of Lewis, J., on Motion to Modify the Judgment.

As to the authority of this court to modify this judgment and order, that will of course depend on the fact as to whether the jurisdiction terminates on sending down the remittitur. The general rule seems to be well settled that this court loses jurisdiction of a case when the remittitur has been sent to and filed in the court below. (*Grayson v. Ruckle*, 1 Cal. 192; *Leese v. Clark*, 20 Id. 387; *Rowland v. Kreyenhagen*, 24 Id. 52.)

This general rule rests, however, on the supposition that all the proceedings have been regular, that no fraud or imposition has been practiced upon the court or opposite party; for if such appears to have been the case, the appellate court will assert its jurisdiction, and recall the case. Against an order or judgment improvidently granted, upon a false suggestion or under a mistake of facts, the court will afford relief even after the adjournment of the term, and will, if necessary, recall a remittitur. (24 Cal. 52.)

A decree will be set aside for irregularity after the record has been remitted. (*Wales v. Travis*, 8 Johns. 566; *Chamberlain v. Fitch*, 2 Cow. 243.)

Under rule 18 of this court, the plaintiff in this case has to the close of this term to file a petition for a rehearing, and the remittitur herein could not properly issue until the close of the term, unless so ordered by the court. No such order was made by this court. The remittitur was issued on the eighteenth of May. The general order directing remittiturs to issue on payment of costs has not, then, been made; and even if it had been so made, the defendants have not brought themselves within the rule.

Believing, then, that the order of this court, affirming the judgment of the court below, was at least improvidently made, and that this court has the authority to correct the same, we have no hesitation in so doing. As to the latter part of plaintiff's motion, asking that the papers be sent down, we are clearly of opinion that the papers in this case properly belong to the district court of the third judicial district. They were brought here by that court for the purpose of determining the motion adjourned, and when that question was disposed of, the purpose for which they

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were here was accomplished, and being a part of the records of the court below, they should be returned there. It would be an unreasonable practice to leave the court below without any record of this case, and such as we are not willing to adopt. The papers should be returned.

We shall therefore order that the remittitur issued herein be recalled; that the order and judgment of this court of the eighteenth of May, 1869, affirming the judgment of the court below, be vacated and set aside; that the papers herein be transmitted to the court below, and that a remittitur issue in accordance with the order and judgment of this court of the fifteenth of May.

NOGGLE, C. J.: I concur.

**JAMES I. CRUTCHER, PLAINTIFF, v. E. C. STERLING,
TERRITORIAL TREASURER, DEFENDANT.**

TAXES.—Taxes are payable in the legal currency of the United States, at its face value.

TERRITORIAL TREASURER.—The territorial treasurer must pay the territorial indebtedness in such funds as he receives. He can not legally pay in any other funds.

COLLECTORS OF TAXES.—The tax collectors of the several counties in the territory have no right to demand the payment of taxes in gold coin, or in anything but the legal currency of the United States at its par value; and they must pay over the same kind of funds received by them.

ADJOURNED into the supreme court, from the district court, second judicial district, Boise county.

Ainslie & Foote and Samuel A. Merritt, for the plaintiff.

George C. Hough and E. J. Curtis, for the defendant.

NOGGLE, C. J., delivered the opinion, LEWIS, J., concurring.

This action comes into this court under the provisions of that singular statute found in the laws of the first session of the legislature of this territory, section 336, on page 153. The facts are agreed upon, and the case was submitted to the district court for Boise county on the second day of

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November, 1868. From some cause which we do not understand, the district court did not decide the case; but under a still more remarkable statute of the same session, section 326, p. 150, adjourned the cause into this court for decision. Notwithstanding there seems to be law for submitting and adjourning cases into this court, justice requires a suggestion, that all matters submitted to any of the district courts hereafter had better be determined by that court, and if parties desire to have such decisions reviewed by this court, they can reach that end under the law as it now stands, without compulsion or dictation on the part of the district judge. This case, upon which the opinion of the supreme court is required, is contained in an agreed statement of facts, filed with the clerk of the district court in Boise county November 2, 1868, and now on file in this court, the matter having been adjourned by the district court into this court, under said section 326 of the laws of the first session aforesaid, for decision.

All there is of the case upon which this court can act is the statement of facts on file with the clerk of this court, as before stated, and which has been read upon the argument. From this it sufficiently appears that the plaintiff was the sheriff of the county of Boise, and keeper of the prison as therein stated; that as lawful holder and owner of territorial warrant No. 52, drawn upon the prison fund, for the sum of five hundred dollars and interest thereon at the rate of ten per cent. per annum until paid, the plaintiff did, on the third day of September, 1867, present said warrant to the defendant as territorial treasurer for registration, and that the same was on that day duly registered by him as such territorial treasurer. The plaintiff claims payment of said warrant in the legal coin of the United States, or in foreign coin at the value fixed for each coin by the United States, or in bullion at its coin value, or in legal-tender treasury notes at two per cent. above San Francisco quotations, as provided by section 2 of the revenue law of this territory, passed at the fourth session of the legislature, and approved January 11, 1867, requiring the revenue of

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this territory to be so collected, and that the territorial proportion thereof be passed to the various funds as collected.

It is further claimed by the plaintiff that before the commencement of the proceedings aforesaid, he duly presented the said warrant, for payment, to the defendant as treasurer as aforesaid, and demanded payment thereof out of said prison fund, in legal coin of the United States, or in foreign coin at the value fixed for such coin by the laws of the United States, or bullion at its coin value, or in legal-tender treasury notes at two per cent. above San Francisco quotations, and that payment thereof in such funds was then and there by him refused; that he still refuses to redeem or pay the same, except in the legal-tender notes of the United States at their par value.

It is further claimed by the plaintiff that if he is compelled to take legal-tender treasury notes of the United States at their par value in payment of said warrant, principal and interest, instead and in place of the gold coin of the United States, at its standard value, he will sustain a loss, and will be damaged in the sum of one hundred and forty dollars, the difference in the actual value of such notes and coin, as before stated.

The plaintiff also claims that by chapter 25 of the laws of the third session, the county jail of Boise county is made a temporary territorial prison, and that the sheriff of said county is thereby made the keeper thereof (section 2, page 161), and that by section 14 on page 163, of the same act, his compensation is fixed; that he is entitled to receive his compensation from the territorial prison fund, as provided in section 5 on page 161, of said laws, at the rates allowed by section 14 of said act, on page 163.

We do not feel called upon in this case to pass upon the point made on the part of the plaintiff, "that the law requiring taxes to be paid in coin is not in conflict with the act of congress making greenbacks a legal tender for all debts." Neither is it necessary for us in this case to declare that chapter 21 of the laws of the second session, page 419, is in conflict with the laws of congress.

As the case is presented, and as the facts are conceded to

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be upon the argument, the treasurer of the territory is bound to pay out, upon all such warrants, and upon all warrants, the same kind of funds which he receives for taxes. This being the case, it becomes his duty to require such funds as may legally be received in payment of taxes, and then he is bound to pay out the same, or sufficient thereof to discharge the legal demands against the territory. For the purpose of this case it is immaterial whether the law requiring taxes to be collected in coin was in conflict with the law of congress or not, or whether a tax is a debt. The plaintiff is entitled to have his warrant paid in the same kind of funds that have been paid into the treasury from the collections of the revenue.

The most important question remaining to be disposed of by the court is the one relating to the character of the funds which are now in the hands of the defendant, as treasurer, or which may hereafter be collected by him under the laws now in force, and as the same was in force at the time this action was commenced.

This court, therefore, may safely admit that the plaintiff is correct in claiming that a tax is not a debt, and that the laws of Idaho territory requiring the payment of taxes in gold, or its equivalent, are not in conflict with the law of congress making greenbacks a legal tender for all debts.

The plaintiff's counsel admit that by the laws of this territory now in force, the collection of taxes in coin can not be enforced, and that the revenue of the territory can only be collected in the legal currency of the United States, at its par value. (See the laws of the fifth session, chap. 1, sec. 2.) This law enacted at the last session of the legislature of the territory is now and must continue in force until changed or repealed by the power that enacted it.

The counsel for the plaintiff further admits that at the August term of this court, in 1867, it was decided by the highest legal tribunal in this territory, that the laws requiring the payment of taxes in coin, or its equivalent, are in conflict with the law of congress making greenbacks a legal tender for all debts, and therefore void. See the opinion of Justice Cummins, delivered at the January term of this

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court in 1868, in the case of *Haas v. Lamkin*, as evidence of the fact admitted as above.

This court is of the opinion that from the time of making the decision in the case of *Haas v. Lamkin*, it so far became the law of this territory that the defendant, as treasurer, was bound by it. It was not then and has not since that time been in his power to disregard it, no matter how erroneous that decision may have been; it was made in a case properly before the court, of which it had ample and complete jurisdiction.

If a majority of the judges concurred, as it appears they did, even if one of their number dissented, the decision of the court, from the time it was declared, became the law of that case and of that question, and must remain the law of the territory until overruled by this court, or reversed by some proper appellate tribunal, or until it is superseded by proper legislation. The case of *Lane County v. Oregon* has been so recently decided, that it in no way affected the former decision of this court, or the defendant as treasurer prior to the passage of the law now in force relating to the collection of taxes, which law is now at least in harmony with the law of congress.

As a part of the stipulation signed by both parties in person, and by their attorneys, as submitted to the court, it is agreed "that the territorial portion of the revenue now (*i. e.*, on the second day of November, 1868), in the territorial treasury, and apportioned to the various funds as by law directed, was collected in United States legal-tender treasury notes, at their par value, by reason of a decision of the supreme court of Idaho territory, rendered in said court at the August term thereof in 1867, and delivered on the twenty-first day of January, in 1868, wherein said law was decided to be in conflict with the law of congress of February 25, 1862, and therefore unconstitutional and void." If the plaintiff ever had a cause of action against the defendant, the foregoing agreement and stipulation put an end to the validity of such a claim.

The parties in this case are before this court upon a statement of facts agreed to by them, wherein they stipulate and

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agree that "the territorial portion of the revenue now in the territorial treasury, and apportioned to the various funds as by law directed, was collected in United States legal-tender treasury notes at their par value, by reason of a decision of the supreme court of Idaho territory. That being the case, and that decision of the court being the declared law of the land, then and since, this court is of the opinion that the action of the defendant in this matter has been proper. By law the defendant has no alternative; he must pay over to the officer, person, or persons, entitled by the laws of this territory to receive the same, such funds as he receives in collecting the territorial revenue. (Section 1, chapter 20, of the laws of the third session—an act to provide for the better protection and disbursement of public moneys.) According to section four of the same act, if the defendant should, as territorial treasurer, attempt to comply with the demand of the plaintiff and pay his warrant, No. 52, in coin or its equivalent, he, having collected the territorial revenue in currency at its par value, as stated in the stipulation aforesaid, would be deemed guilty of felony, and upon conviction thereof in a court of competent jurisdiction, he must be punished by imprisonment in the territorial prison for a period of not less than one year nor more than five years, or by fine not less than five hundred dollars nor more than ten thousand."

It is the opinion of this court that the defendant may properly discharge warrant No. 52, and all others presented to him for payment, in the legal-tender notes which he has received, as such treasurer, in collecting the territorial revenue at their par value. This we think is strictly in harmony with the further stipulation of the parties, "that the plaintiff is entitled to receive from the defendant, as such treasurer, payment of said warrant out of such moneys and funds as the court may decide are only receivable for taxes and demands on the territory under the revenue laws," etc.

Believing that the defendant has complied with the law, the court is of the opinion that the plaintiff has failed to establish a cause of action against him, and for the reasons aforesaid, it is the order and direction of the court that the action be and the same is hereby dismissed at the cost of the plaintiff.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT,
JANUARY TERM, 1870.

PRESENT:
HON. DAVID NOGGLE, CHIEF JUSTICE.
HON. MILTON KELLY, } JUSTICES.
HON. JOHN R. LEWIS, }

G. W. QUIVEY, APPELLANT, *v.* J. N. LAWRENCE,
RESPONDENT.

IMPROVEMENTS—PUBLIC LANDS—TAXATION.—Improvements upon public lands, as also the possessory right thereto, are taxable.

ASSESSMENT—TAXATION—PUBLIC LANDS.—The assessment of land is a prerequisite which can not be dispensed with. It is the basis upon which all subsequent proceedings rest. For the purpose of defeating a tax deed, evidence may be given that the land was not assessed, or that it is public land.

TAX SALE.—If the improvements on land be assessed and taxed, a sale of the land for such tax is void.

APPEAL from the second judicial district, Ada county.

Miller & Brumback, for the appellant.

H. E. Prickett and E. J. Curtis, for the respondent.

Opinion by LEWIS, J., NOGGLE, C. J., concurring.

This is an action brought by the plaintiff, who claims to

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be the owner in fee of certain real estate in Boise City, to recover the same. The case was tried by the court below without the intervention of a jury, and judgment was rendered against the plaintiff for costs. Plaintiff appeals. On the trial the plaintiff offered in evidence a deed from the tax collector of Ada county, of date July 2, 1867, reciting, among others, the following facts: That the owners of the following described lots, piece and parcel of lots, failed and neglected to pay the taxes thereon for 1866; that notice was duly published that he would, on the seventeenth of December, 1866, at the court-house door, in Boise City, sell said lands and real estate; that the sale was adjourned from day to day, and on the twenty-ninth of December, 1866, he did sell the following described piece or parcel of land to the plaintiff for the sum of eighteen dollars and five cents, to wit: Lots Nos. two (2) and three (3) in block thirty-three (33) in Boise City. That no redemption has been made.

The defendant sets up in his answer that one John McLellan is the owner as against all persons save the United States, and that defendant occupies premises as the lessee of McLellan. The defense offered in evidence page 35 of the assessment roll of Ada county for 1866, on which page, in the column and under the heading "Description of Real Property," is assessed: "One house and fence on lots numbers two (2) and three (3), in block thirty-three (33), in Boise City, and in the following column under the heading "Cash Value," the figures 500. The defense also proved that the lots in controversy were on the lands of the United States.

The plaintiff assigns for errors of law, the admissions as testimony in the case, page 35 of the assessment roll, and the conclusions of law derived by the court from the findings of facts.

The court found the following as the facts in the case:

1. That the plaintiff claims title and the right to the possession of the premises mentioned in the complaint by virtue of a tax deed from the tax collector of Ada county, of date July 2, 1867, which said deed purports to be based upon a sale of said premises and real estate for delinquent

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taxes alleged to have been assessed against the property for the year 1866.

2. That the property mentioned and described in said deed was not assessed in the year 1866, but that the assessment relied on to support the deed was made upon the house and fence upon said real estate, and not the real estate itself.

3. That such assessment does not place any value in dollars and cents, or otherwise, upon said property.

As conclusions of law the court finds: 1. That the assessment is void. 2. That the tax collector had no right to sell said property. 3. That plaintiff acquired no title or right of possession of the premises, and that he is not entitled to take anything by his suit, but that defendant is entitled to judgment for costs.

There is also an additional fact shown to the court on the trial, to wit: that the land mentioned in the tax deed is the property of the United States.

It is claimed by the plaintiff that the court erred in the admission of the assessment roll of 1866 in evidence, for the reason that, under the provisions of the revenue law, second session, section 42, "any deed derived from a sale of real estate, under the provisions of this act, shall be conclusive evidence of title—except as against actual frauds, or prepayment of the taxes upon which such sale was made." Section 4 of the statute provides that "all lands, belonging to the United States, shall be exempt from taxation." By section 3, every tax levied under the provisions of the act is made a lien against the property assessed. By section 31 the tax collector is required, on the second Monday in November each year, to enter on the duplicate assessment roll a statement that he has made a levy upon all the property therein assessed, the taxes upon which have not been paid; and he shall also proceed to make out and file with the auditor a list of all persons and property then owing taxes, said list to be known as the delinquent list. By section 34 the tax collector is on the third Monday in November required to post notices stating that, at the expiration of twenty-one days, he will proceed

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to sell the property belonging to the delinquent taxpayers, for the payment of the taxes due thereon. And it is made his duty to keep such delinquent tax list open for public inspection during office hours. By section 40 said delinquent list, a copy thereof, certified, shall be *prima facie* evidence in any court to prove the assessment, the property assessed, the delinquency, the amount of taxes due and unpaid, and that all the forms of law relative to the assessment and levy of the taxes have been complied with.

We do not think that under the provisions of this statute the defendant is precluded from showing, either that the lands were exempt from taxation, or that in fact the lands had not been assessed for the year 1866, for the taxes of which they have been sold. In order that lands may be sold for taxes, they must be subject to taxation and duly assessed. Of this there can be no doubt. Section 6 of the organic act provides that no tax shall be imposed on the lands of the United States; the statute exempts the lands of the United States from taxation. It can not be intended that the legislature sought to prevent this fact from being shown: hence we conclude that, it being shown that the lands described in the deed were lands of the United States, the sale was a mere nullity.

Again: In Blackwell on Tax Titles, page 106, the rule as to the assessment of property is thus stated: "A listing and valuation of the lands is a prerequisite which can not, under any circumstances, be dispensed with. It is the basis upon which all the subsequent proceedings rest."

It is upon this rule that our statute is based, for by the provisions of the act above referred to there can be no lien for taxes on the land, except the land be assessed. There can be no levy upon the lands, unless they be described in the assessment roll. The delinquent list is taken from the assessment roll, and no property can be sold except it be found in the delinquent list: hence the basis of the whole proceedings is the assessment roll. The delinquent list is *prima facie* evidence that all these things have been done, but the owner is not, and can not be, precluded from showing upon a s.

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ing that in fact his lands were not assessed or taxed, and hence nothing being due thereon, the sale is void.

The reason of the law requiring an assessment roll with a description of the lands of each person thereon is, that the owner may examine the roll in the proper office and know whether his property be taxed, that he may pay it, and prevent a delinquency. And we think, for the same reason, the law requires that this list be kept open for inspection, to wit, that the owner may examine the delinquent list, and if his property be thereon found described, he may pay the tax and prevent the sale. And in no case can lands be sold for taxes, unless they be assessed, and they must be sold by the same description as that given in the roll and delinquent list. The "house and fence" upon the lots in question being only assessed, and not the lots, the sale was void; and the plaintiff took nothing by his deed. We may state that the assessment of the "house and fence," being improvements upon the lots, is not, in our opinion, void. It is well settled that improvements upon public lands, as also the claim to or the possessory right thereto, is taxable.

The judgment of the district court is affirmed.

THE PEOPLE, RESPONDENTS, v. AH CHOY, APPELLANT.

CRIMINAL LAW—INDICTMENT.—An indictment for murder is sufficient if it charges the killing to have been done with malice aforethought; this is defined by lexicographers as meaning premeditated, and premeditated and deliberate are synonymous terms.

FLIGHT—EVIDENCE.—Evidence of flight by a person accused of crime is admissible for the purpose of showing who did the act, not for the purpose of determining the degree of the offense.

APPEAL from the third judicial district, Owyhee county.

Rosborough & Preston, for the appellant.

L. P. Higbee and Frank Ganahl, for the respondents.

NOGGLE, C. J., delivered the opinion, KELLY and LEWIS, JJ., concurring.

This is an appeal brought by the defendant to reverse the

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judgment of the Owyhee district court rendered at the last June term of said court. Upon the argument of this case in the supreme court two causes of error are assigned by the defendant upon which he relies to reverse the judgment: 1. He claims that the indictment is defective because it does not allege the killing to be "deliberate and premeditated," in the words of section 17 of the statutes of crimes and punishments on page 438 of the laws of the first session of the legislature of Idaho territory; and, 2. Because the district court erred in excluding the evidence offered by the defendant to explain his motive in flying from the place of the homicide, and for the purpose of rebutting the presumption arising from flight. There is also a third point made in the defendant's brief, viz.: because the evidence submitted to the jury did not warrant a conviction of murder in the first degree. This last point, however, was abandoned on the argument, leaving only the two first to be considered by this court.

Is the indictment defective, as claimed by defendant's counsel, or is the first error, as above stated, well assigned? Or did the district judge properly direct the jury, that the indictment in this case sufficiently charged the crime of murder in the first degree?

The statutes of this territory, sections 233 and 234 of the Criminal Practice Act, on page 266 of the laws of the first session, and section 242, on page 267, very positively state what an indictment shall contain, and in obedience to these statute laws, the court can not require the prosecution to go further.

According to the statutes referred to, "the indictment shall be sufficient if it can be understood therefrom: 1. That it is entitled in a court having authority to receive it, though the name of the court be not accurately set forth. 2. That it must be found by a grand jury of the county in which the court was held. 3. That the defendant is named, or if his name can not be discovered, that he be described by a fictitious name, with a statement that he has refused to disclose his real name. 4. That the offense was committed at some place within the jurisdiction of the court. 5. That

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the offense was committed at some time prior to the time of finding the indictment. 6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. 7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case."

The laws of this territory are conceded to be copies from the laws in force in California; that being so, the supreme court of Idaho may very properly, in construing its laws, follow the decisions of the supreme court in California. In the case of *The People v. Edward Lloyd*, 9 Cal. 54, it is held that "it is not necessary in an indictment for murder to state the degree of the offense. Under our statute, the essential averments of an indictment should be the same as at common law." In the same book, page 583, in the case of *The People v. Dolan*, the court say: "The third objection is founded on the absence of the word 'deliberate,' which the applicant contends is necessary to constitute the crime of murder in the first degree. The indictment charges the act to have been done with malice aforethought."

Aforethought, as defined by Webster, means premeditated; premeditated and deliberate are synonymous. The definition given of murder in the statute is "the unlawful killing of a human being with malice aforethought, expressed or implied." This definition includes both degrees of murder, and it is sufficient if the indictment charges the offense in the language of the statute defining it. (*The People v. Parsons*, 6 Cal. 487; *The People v. Murray*, 10 Id. 309-313; *The People v. Ybarra*, 17 Id. 166.) From these authorities, it is the opinion of this court that under the laws of this territory "the unlawful killing of a human being with malice aforethought is murder in the first degree," and that it is not error in the district court to permit the prosecution to prove a deliberate and premeditated killing when the defendant is charged with the "unlawful

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killing of a human being with malice aforethought," which is defined by lexicographers to mean premeditated, or premeditate and deliberate.

The second and last point will now be considered, which is: "That the district court erred in excluding the evidence offered by the defendant to explain his motive in flying from the place of the homicide, and for the purpose of rebutting the presumption arising from flight."

In the examination of this case, we do not find that the question of guilt was in the least dependent upon evidence of flight, or that such evidence was given upon the trial to influence the jury to find the defendant guilty of the crime with which he stands charged. Such proof in a case like this, when the fact that the defendant struck the fatal blow is clear, indisputable, and undisputed, is useless. Evidence of flight by the defendant, who admits that he took the life of the deceased, can not be resorted to for the purpose of fixing the crime or the grade of the crime; such evidence may very properly be resorted to for the purpose of determining who did the act; but when the evidence of striking the blow is positive, admitted by the defendant and his counsel, evidence that he immediately ran from the place where he had taken the life of the deceased certainly could have no effect in the minds of the jury in determining the grade of the offense. Such evidence is only useful to unfold secrecy and point to the one who did the act.

In the case of *Rex v. Burdett*, 4 Barn. & Ald. 95, the chief justice said: "If no fact could be ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime can be given; the man who is charged with theft is rarely seen to break the house or take the goods; and in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup."

On the same subject Mr. Justice Betts says: "Until it pleases Providence to give us means beyond those our present faculties afford of knowing things done in secret, we

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must act on presumptive proof, or leave the worst crimes unpunished.”

This same doctrine is recognized as sound by American jurists and authors. (Burrill on Circumstantial Evidence, 117, 124–126, 474–478; also chapter 22 of Burrill on Circumstantial Evidence, treating of the conduct, demeanor, and language after the commission of a crime.) When an offense has been committed and the offender is unknown, such evidence may point to the guilty party, but no further.

There is nothing in the record in the case before the court that shows that circumstantial evidence was even resorted to for the purpose of pointing out the defendant as having committed the act, and nothing to show that such evidence was resorted to for any purpose whatever. Counsel for the defendant admitted, upon the argument of this case (and the record shows the entire correctness of such admission), that the facts necessary to support the verdict were sustained by direct proof. The record also shows that after the district court ruled out the evidence offered by the defendant, the court did offer to permit the defendants to prove, that at the time the said defendants were so fleeing they were pursued by a mob, and not to escape from being arrested. This proof, it seems, the defendants did not attempt to make.

From the record in this case we are unable to find in the conviction of the defendant any error on the part of the district court; we are also of the opinion that a further trial of this cause could not properly release the defendant from the legal consequences of the crime charged against him.

The judgment of the district court must, therefore, be affirmed, with directions to that court to fix a proper day for the execution of the defendant, Ah Choy, and that the said court cause the sentence heretofore pronounced in this case to be executed.

Judgment affirmed.

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THE PEOPLE, RESPONDENTS, v. JAMES FREEMAN,
APPELLANT.

CRIMINAL LAW—DESCRIPTION OF PROPERTY—INDICTMENT.—The common and ordinary acceptation of property is to govern in its description; the description must be such as will enable a jury to say whether the chattel proved to have been stolen is the same as that charged in the indictment.

SPECIMENS DEFINED.—“Specimens of gold and silver ores,” in common and ordinary acceptation, means pieces and samples of such ores severed from the ledges.

INDICTMENT.—An indictment charging the property stolen as “a quantity of specimens of gold and silver ores of one hundred and fifty pounds in weight,” is sufficient.

APPEAL from the district court of the third judicial district, Owyhee county.

Martin & Miller, for the appellant.

A. Heed and L. P. Higbee, for the respondents.

Opinion by LEWIS, J.; NOGGLE, C. J., concurring.

At the June term, 1869, of the district court for Owyhee county, the defendant was indicted and convicted of grand larceny. He interposed his demurrer to the indictment, which was overruled, and for that reason moved in arrest of judgment, which was also overruled. The only question presented to this court is the sufficiency of the indictment. The defendant insists that the indictment is not sufficient, for several causes, but two of which are urged here, and which we will proceed to notice. It is claimed that the indictment is insufficient for want of a sufficient description of the property stolen; that the facts stated do not constitute a criminal offense under the laws of Idaho.

The indictment charges, “that the said James Freeman, on the fifteenth day of June, A. D. 1869, at the county of Owyhee, in the territory of Idaho, a quantity of specimens of gold and silver ores, of one hundred and fifty pounds in weight, of the value of five hundred dollars, the property of George W. Grayson, then and there being found, feloniously did steal, take, and carry away, contrary,” etc.

As to the description of the property, the rule is laid down in Whart. Crim. L., sec. 355, as follows:

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“The common and ordinary acceptation of property is to govern its description, and the certainty must be to a common intent; that is, such as will enable a jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded.” The following descriptions have been held sufficient: “Two pair of boots,” “three head of cattle,” “one hide,” “one ham,” “a parcel of oats.” Applying the above rule of construction, we are fully satisfied that the property is sufficiently described in this case.

The objection is strongly urged, that the facts charged do not constitute a public offense, for the reason that the property described savors of the realty, and hence is not the subject of larceny. And in support of this, counsel cite *The People v. Williams*, 35 Cal. 672. There is no doubt but that the rule is correctly laid down in that case, but there is no similarity between that case and the one at bar. In the case of *The People v. Williams* the offense is stated thus: “The defendant did unlawfully steal, take, and carry away from the mining claim of the mining company fifty-two pounds of gold-bearing quartz rock,” and as a quartz claim is real estate, the books very properly say that there is some doubt as to whether the defendant severed the rock from the ledge at the time of the theft, or whether the rock was severed on a previous occasion; and giving him the benefit of the doubt, the indictment was held bad. The indictment in the case at bar charged the property stolen to be “a quantity of specimens of gold and silver ores, of one hundred and fifty pounds in weight.”

It is not charged to have been taken from any ledge or mining claim, and by no forced construction can it be made to appear that the property stolen, as stated in the indictment, savors of the realty.

The word specimen has a meaning well understood, particularly in this mining country. When we speak of specimens of quartz, it is as fully understood here what is meant as if you should speak of a horse. Webster defines the word thus: “A part or small portion of anything; a sample; a cabinet of minerals consists of specimens.”

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According to the above definitions, as well as the common acceptations of the word, we have no hesitation in holding that the indictment is good, and that the demurrer and motion in arrest were properly overruled.

The judgment of the district court is affirmed.

R. A. LOCKETT, APPELLANT, v. L. B. LINDSAY ET AL.,
RESPONDENTS.

JUDGMENT—ESTOPPEL.—A judgment on demurrer to a bill in chancery, that the bill is bad in substance, or does not state facts sufficient to constitute a cause of action, can not be pleaded in bar to a good bill for the same cause of action. Such judgment is, in no sense, a judgment on the merits.

APPEAL from the district court, second judicial district, Ada county.

H. E. Prickett, for the appellant.

Rosborough & Preston and J. R. McBride, for the respondents.

Opinion by NOGGLE, C. J.; LEWIS, J., concurring specially. KELLY, J., also concurred.

The plaintiff in this action alleges that one B. A. Lucy was the owner and in the possession of lot number one, in block number ten, in Boise city, Ada county, Idaho territory. That on the twenty-first day of April, 1868, the said B. A. Lucy, and Maggie A., his wife, for a valuable consideration, sold and conveyed said lot by deed to this plaintiff; that said deed was duly acknowledged and recorded, etc., and that the plaintiff has ever since been the owner and in the possession of said premises. That on the second day of January, 1869, the defendant R. H. Lindsay obtained a judgment in the district court of Ada county aforesaid, against the said B. A. Lucy, for the sum of four hundred and ninety-seven dollars and ninety-eight cents. That said judgment was duly docketed, etc., on said second day of January, 1869, and execution issued thereon, directed and delivered to the sheriff of said Ada county.

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That the defendant L. B. Lindsay was such sheriff. That by virtue of said judgment, and of the execution issued thereon, the said last-named defendant, as sheriff, levied on the said lot of land, the property of the plaintiff, as the real estate and property of said B. A. Lucy, and on the thirtieth day of January, 1869, the said L. B. Lindsay, as sheriff, sold said lot and premises at public vendue, etc., and that the same was bid off by the defendant R. H. Lindsay, for the sum of five hundred and forty-six dollars, he being the highest bidder. That the defendant L. B. Lindsay, as such sheriff, gave to the defendant and purchaser, R. H. Lindsay, aforesaid, a certificate of sale, and a duplicate of the same was filed by the said sheriff with the recorder of said Ada county, on the thirteenth day of February, 1869.

The plaintiff further alleges that the defendant L. B. Lindsay, as such sheriff, threatens to execute and deliver to said defendant R. H. Lindsay, or to his assigns, a deed and conveyance of said premises at and upon the expiration of six months after the date of such sale. Whereupon the plaintiff demands judgment that said sale and the certificate of sale be set aside, and that said certificate of sale be canceled, and that the defendant R. H. Lindsay be barred, etc., of all right, etc., under said sale, and that the defendant L. B. Lindsay, as sheriff, be perpetually enjoined and restrained from all further proceeding under said sale, etc.

The only issue presented to this court for its determination is a plea in bar of the right of the plaintiff to bring this action. The answer in bar to the facts set up in plaintiff's complaint is as follows: "That on the twelfth day of May, A. D. 1869, in the above-named court and in the above-named county, in an action brought by the above-named plaintiff against the above-named defendants, and for the same cause of action as that set forth in said complaint herein, these defendants duly recovered a final judgment against the said plaintiff, dismissing his complaint, and for the sum of thirty dollars and ninety cents, United States gold coin, as their costs and disbursements, which judgment was duly recovered and given against the said plaintiff upon the merits thereof."

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The court below held that this plea was sufficient, and on reading the record in that case gave judgment for the defendant and against the plaintiff, dismissing the plaintiff's complaint with costs against him.

In this case, a motion for a new trial having been made and overruled, the question is now submitted to this court for its decision. The statement for a new trial shows that the plaintiff, previous to the commencement of this action, on the eighth day of April, 1869, filed his complaint in said district court of Ada county, setting forth certain facts constituting his cause of action, and praying the same relief asked for in his said second complaint. To that complaint a demurrer was filed setting forth as a ground of demurrer, "that the complaint did not state facts sufficient to constitute a cause of action." Upon the joinder in demurrer the district court sustained the demurrer, and the plaintiff took leave to amend; but upon a failure to do so within the time allowed by the court, on the defendants' motion the plaintiff's complaint was dismissed. The defendants now claim that the order or judgment dismissing the plaintiff's complaint of May 12, 1869, is a bar to this action; to sustain this view of the case they cited the following authorities, to wit: 1 Daniell's Ch. Pr. 683, declaring that "a decree or order of the court by which the rights of the parties have been determined or another bill for the same matter dismissed, may be pleaded to a new bill for the same matter." In support of this doctrine the defendants have also referred us to 1 Daniell's Ch. Pr. 799; *Holmes et al. v. Remson et al.*, 7 Johns. Ch. 286; *Perrine v. Dunn*, 4 Id. 140; Stone Eq. Pl., sec. 456, and to several other cases.

The cases referred to by defendants seem to establish the principle, that the dismissal of a complaint upon the merits, without the direction of the court, shall be without prejudice, etc.; such an order or judgment may be pleaded in bar to a new complaint for the same matter.

In this case the plaintiff and appellant claims and insists that the order or judgment of May 12, 1869, dismissing his complaint in his action then pending, and which order or judgment is now interposed in this case as a bar to his

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right to recover in this action, is not an order or judgment dismissing his said complaint upon the merits, for the reasons that in that case the district court sustained a demurrer to the complaint, and in doing so the court decided that the complaint was so defective that it did not state facts sufficient to constitute a cause of action, and because it was so defective the said district court decided that it was bad, and sustained a general demurrer to the same, and the plaintiff failing to amend his complaint, it was for that reason dismissed, and for no other reason. The appellant further claims that the complaint in the action before the court is a good complaint for the same cause of action and between the same parties; that the decision of the district court in sustaining the demurrer and dismissing the complaint on the twelfth of May, 1869, was not a decision upon the merits, and is therefore no bar to the action before the court. In support of the plaintiff's positions, we are referred to the following authorities: *Gillman v. Rives*, 10 Pet. 298; *Robinson v. Howard*, 5 Cal. 528; *Dexter v. Clark*, 35 Barb. 271; 1 Stark. 194, 199; 2 Pars. on Cont. 234; 3 Greenl. Ev., sec. 35; Chit. on Cont. 786; 1 Greenl. Ev., sec. 528–534. In *Gillman v. Rives*, 10 Pet. 302, the court, in effect, declares, that in sustaining the demurrer to the complaint in the former action and in dismissing the complaint, the district court decided that the complaint did not state facts sufficient to constitute a cause of action, and that the district court, upon the trial of the cause before the court, could not properly review that decision or look into the complaint thus held to be bad, for the purpose of determining differently, in order to hold the order or judgment in that case a bar to the plaintiff's right to recover in the case before the court.

After carefully examining and considering the authorities in this case referred to by the appellant and the respondent, together with such others as are within our reach, this court is of the opinion that a judgment sustaining a demurrer to a complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action, is in no just sense a judgment upon the merits so as to constitute an order or

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judgment dismissing such complaint a bar to a good complaint for the same cause of action.

There is nothing in the record offered in bar of the plaintiff's right to recover, showing that the court in that case made any decision upon the merits, as stated in the complaint in this case. There is no doubt that a plea in bar must be *ad idem*, "to the same," or "to the like intent;" and it is no good reason for holding that because the plaintiff fails in a former case upon a defective complaint, when he has made a new case in which he has a good complaint and has supplied the defects that were found in the case that failed, still he shall not be allowed to proceed.

This court is of the opinion that the district court erred in holding that the decision of that court of May 12, 1869, sustaining the defendants' demurrer and dismissing the plaintiff's complaint, was a bar to the action pending before that court at the November term, 1869. (Gould's Pleadings, 4th ed., ch. 9, secs. 42, 46.)

The judgment of the district court is therefore reversed, and this cause is hereby remanded to said district court, with direction to proceed therein in accordance with this opinion.

LEWIS, J., concurring:

The question presented for our decision in this case, is this, whether a judgment, that a bill in chancery is bad in substance, can be pleaded in bar to a good bill for the same cause of action. The district court held that the first bill filed was bad, in this, that the bill did not state facts sufficient to constitute a cause of action. Whether the bill was good or bad, is a question we can not consider. The district court adjudged it bad—which judgment is in full force. This court is bound by that judgment, as no appeal has been taken therefrom.

I am of opinion that the new bill filed is good; and if the facts stated are true, the plaintiff is entitled to the relief prayed; and for the purposes of this case, in this court, these points may be conceded. In the case of *Gillman v. Rives*, 10 Pet. 298, the very point is decided as to an action

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of law, to wit: that a judgment on general demurrer, that the declaration is bad in substance, can never be pleaded in bar to a good declaration for the same cause of action, for the reason that it is in no sense a judgment upon the merits. The same doctrine is very strongly laid down in Gould's Pleadings, chap. 9, secs. 42-47; and see sec. 45, where the rule is thus stated: "If the plaintiff fails in his first action, from the omission of an essential allegation in his declaration, which allegation is supplied in the second, the judgment is no bar to the second, although both actions were brought to enforce the same right."

These authorities settle the question as to an action of law: In *Perine v. Dunn*, 4 Johns. Ch. 140, the rule is thus laid down: "A bill regularly dismissed upon the merits, without any direction that it be without prejudice, may be pleaded in bar of a new bill for the same matter." The same point is decided in *Holmes v. Remsen*, 7 Johns. Ch. 286. Was the bill in this case dismissed upon the merits? Bouvier says, that a defense upon the merits is one that rests upon the justice of the cause, and not upon technical grounds.

The supreme court of California, whose decisions are of much weight in this territory from the fact that our practice act is almost an exact copy of theirs, lays down the rule thus: "A judgment upon demurrer is not always a bar to a subsequent action, but only when it determines the whole merits of the case." (*Robinson v. Howard*, 5 Cal. 428.) I can see no reason for applying any different rule as to the point in question to a bill in chancery, than is applicable to a declaration at law.

The demurrer in the case at bar raised the question whether the complainant had made a case upon the face of his bill, and the court held he had not. He now discloses a good case in his bill. He sets out additional facts.

The merits of the case have not been passed on by the court. I conclude, then, that the judgment of the district court on demurrer is not a good plea in bar to the bill in the case before us. Hence, I concur with this court in holding that the judgment of the court below should be reversed.

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THE PEOPLE, RESPONDENTS, v. EDWARD MAXON AND
CHARLES STONE, APPELLANTS.

CRIMINAL LAW JURISDICTION—JUSTICES' COURTS—LEGISLATIVE POWER.—

The legislature has no power, under the organic act, to authorize a justice of the peace to try a criminal case in which the fine or penalty exceeds, or may exceed, one hundred dollars.

IDEM—DISTRICT COURTS.—In cases of prosecution for misdemeanors, where the fine or penalty does not exceed one hundred dollars, the district courts and justices' courts have concurrent jurisdiction.

TRESPASS—PUBLIC LANDS.—It is no defense to an action or prosecution for trespass committed upon public land, that such land is the property of the United States.

APPEAL from the second judicial district, Ada county.

J. R. McBride and Joseph Miller, for the appellants.

H. E. Prickett, district attorney, for the respondents.

Opinion by KELLY, J.; NOGGLE, C. J., concurring. LEWIS, J., dissented.

At the November term of the district court for the second judicial district, Ada county, the defendants were indicted for malicious mischief in cutting, tearing down, and destroying a certain gate, the property of one Robie & Rossi. To this indictment the defendants interposed their demurrer to the jurisdiction of the court, on the ground that the offense charged in the indictment is within the exclusive jurisdiction of the justices of the peace. The demurrer was overruled, and the defendants tried and convicted, and a motion in arrest of judgment having been overruled, and judgment having been pronounced, the defendants appeal to this court for its decision.

It is contended by appellants' counsel that the six hundred and thirty-fifth section of the civil practice act, defining the jurisdiction of justices of the peace, confers jurisdiction over all offenses punishable by fine not exceeding five hundred dollars or imprisonment not exceeding six months, or by both such fine and imprisonment; that section 144 of the act defining crimes and punishments, under which this offense is charged, imposes a fine not exceeding

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two hundred dollars and six months' imprisonment in the county jail, or both; and for this reason the offense charged in the indictment is within the exclusive jurisdiction of a justice of the peace, and is not indictable, and can not be tried in the district court. The appellants' counsel admit that the organic act of our territory limits the jurisdiction of justices of the peace to one hundred dollars in civil actions; but, on the other hand, they contend there is no limitation in criminal actions, except such limitations as the legislature shall prescribe.

That part of section 9 of the organic act, which refers to the jurisdiction of the several courts of the territory, reads as follows: "The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be limited by law; *provided*, that justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of law may be in dispute, or when the debt or sum claimed shall exceed one hundred dollars; and the supreme and said district courts, respectively, shall possess chancery as well as common law jurisdiction."

It is so well understood and so generally conceded that the organic act takes the place of, and performs the office of a constitution for a territory, we shall not make any argument in support of this question. Taking it, as admitted, that the organic act is the constitution of our territory, subject to such alterations as congress may, from time to time, provide, the question addresses itself with more force to the judiciary than ordinary legislative acts; and we are to apply those rules applicable to the construction of constitutional questions. Statutes prescribe minute directions for those affected by them, and can and do enter into the details of our daily transactions. Constitutions go but little beyond the enunciation of general principles, and it would be an absurdity to apply to a declaration of principles the same rules of construction that are proper in regard to an enactment of details.

In regard to a statute, the general duty of the judge is that of a subordinate power to ascertain and to obey the

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will of a superior. In regard to a constitution, his functions are those of a co-ordinate authority, to ascertain the spirit of the fundamental law, and so to carry it out as to avoid a sacrifice of those interests which it is designed to protect. No absolute rules can be framed for the interpretation of constitutions; nor can we adhere to the written letter of the constitution, because any such system would render constitutions practically intolerable; and, on the contrary, a loose and careless interpretation would be attended with serious danger.

With the application of these general principles we will endeavor to consider what power was conferred upon justices of the peace under the constitution or organic act of the territory, and whether the acts of the legislature giving jurisdiction to the extent of five hundred dollars in criminal cases are incompatible with said organic act.

It is contended by counsel for appellants, that the proviso in section 9 of the organic act, restraining the jurisdiction of justices of the peace, has no general significance, and must be limited to civil jurisdiction, because the words, "debt or sum claimed shall not exceed one hundred dollars," can not refer to a fine in criminal cases; and the preceding words of the act, "the jurisdiction of the several courts herein provided for, appellate and original, and that of the probate court, and justices of the peace, shall be limited by law," authorize the legislature to fix the limit or jurisdiction of justices of the peace in criminal cases without reference to the provisions of the organic act; and the limit of five hundred dollars, fixed by the legislature, or any amount the legislature might see proper to fix, can not be in conflict with the provisions of the organic act.

Judge McBride, our former Chief Justice, in the case of *Landon v. Bartley*, in the second judicial district, October term, 1865, reported in Cummins' Supreme Court Reports, p. 219, has made an elaborate argument upon the jurisdiction of the several courts of this territory, including those of justices of the peace, and I think his law is well grounded, and ought to govern this case. That case was a question of jurisdiction of the probate courts, but in the argument the

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jurisdiction of justices of the peace is so well defined I shall take the liberty to borrow the main portion of his argument. Justice McBride says: "The entire territorial organization is the creation of congressional legislation. To say that its creation, the territorial legislature, can not be governed, controlled, and limited by the authority which created it, is to assume that the creature is superior to the creating power. It is sufficient to say that Congress has always assumed to govern the territories; and its authority has been frequently affirmed by every department of the government; and as it is the source of our entire system of government in the territories, it would be pulling down the very foundation beneath us to question it."

Speaking of probate powers, Judge McBride says: "If the legislature can confer probate jurisdiction upon those courts, then they may confer probate power upon justices of the peace; and if common law and chancery jurisdiction may be distributed among these various courts, as the argument insists, then we may have a justice of the peace performing the functions of an English chancellor. For while the inhibition of the organic act declares that justice's courts shall not have cognizance of cases involving the title of boundaries of lands, nor of cases where the sum demanded exceeds one hundred dollars, this would still leave the most delicate and important equity cases, and an unlimited criminal jurisdiction within the limits of justice's courts. * * * The various courts provided in the organic act of this territory were known to the jurisprudence of America as distinct classes of courts, having each its general powers and duties, and were constituted with reference to a complete judicial system for the people of the territories, and the jurisdiction of each was intended to be confined and expressed in the known meaning and legal names of each."

When an American lawyer speaks of a "district court" the general jurisdiction of that court is at once suggested to the mind. When one speaks of a "probate court" its office and powers have a different meaning; and courts of justices of the peace the same. I assume, therefore, that by

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the organic act each of the courts named was invested with peculiar jurisdiction pertaining to each, *pro re nata*, and while it was made the duty of the territorial legislature to define by law the bounds of that jurisdiction, and while in some instances, as in the probate and justices' courts, they might limit the jurisdiction, it could confer none on any of these courts. Who would contend that an act empowering a justice of the peace to impanel a grand jury, and to try and punish capital offenses, would be valid? I apprehend no one. And yet if the territorial legislature can confer a jurisdiction upon the probate court which is not inherent in it, but which turns it into a court of common law, it can equally authorize a magistrate to try a felon, and execute the condemned criminal. But we are met by the suggestion that the organic act declares that the jurisdiction of these various courts "shall be limited by law;" and we are asked if the jurisdiction is confirmed by the organic act, why these provisions? The answer is twofold, and I think convincing. Those who contend in opposition to the views I am advancing, assume that the words "limited by law" mean the same as prescribed by law, and here is a fatal error. The legislature may limit the jurisdiction of these courts, *i. e.*, their substantive existing jurisdiction, but they can invest them with none. It may contract their powers by transferring those which pertain to the higher courts, but it can in no case confer an additional jurisdiction, and this is evident from the declaratory sentence following the authority to limit, "that the supreme and district courts shall have chancery and common law jurisdiction; thus retaining to them the plenary power inherent in them, and protecting them from any emasculation." But it may be asked, if the supreme and district courts had the jurisdiction claimed by them, and are protected by the phrase above quoted from any attempt of the legislature to deprive them of their authority, why were they included in the sentence authorizing the legislature to limit their jurisdiction by law?

The words jurisdiction, both appellate and original, "shall be limited by law," simply apply to the regulations of the

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appellate powers of these courts as between themselves and between them and the inferior courts. The legislature might limit the appellate powers of the supreme and district courts, and might limit the original jurisdiction of the probate and magistrates' courts.

Much stress was laid by counsel on the argument that when powers were conferred on a court and not made exclusive, they should be so construed. If the argument was to be applied to courts of the same or co-ordinate character, the claim would be just and the logic sound.

If we adopt the argument in theory and practice, it would destroy all the symmetry of our territorial judicial system. Instead of a judiciary, each branch of which has defined powers and duties, such as is intended by the organic act, we should have a confused jumble of judicial powers, distributed according to the whims or caprice of the legislative body in a new country, where system and method are proverbially disregarded, and temporary objects and ends constantly exercise a large control. By the interpretation for which I contend, we have given us by the organic act a judicial system not inferior to any within the Union; whereas, if the opposite construction is adopted, we should have no such thing as system, but the whole mass of judicial powers would be confusedly thrown into the various courts according to the supposed necessities of the time and in utter violation of every rational theory of law. It would seem to me that this argument is sufficiently applicable and ought to conclude the defendants in this case. The errors which judges are most likely to fall into in the interpretations of constitutional questions is in confounding constitutions with statutory enactments. The former deals in generalities and the latter in details. "A constitution does not and can not, from its nature, depend in any great degree upon mere verbal criticism or upon the import of single words." "The maxims which have found their way not only into judicial discussions but into the business of common life, as founded in common sense and common convenience, are applicable to the construction of constitutions."

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By applying these rules to the language of the ninth section of the organic act, we shall not be at a loss in determining what powers were conferred upon justices of the peace. The jurisdiction was the mischief, and the organic act intended to fix the powers or bounds of jurisdiction. The only question then is, does the language of the organic act limit the jurisdiction in general terms, and was the jurisdiction the object of the act? for no construction in the interpretation of a constitutional power is to be allowed which plainly defeats or impairs its avowed objects. It is admitted by all that this provision of the act limits the jurisdiction of justices of the peace in civil cases, beyond the bounds of which the legislature can not go, but defendant's counsel contend the phraseology of the language upon a strict construction is applicable only to civil jurisdiction, and for that reason the criminal jurisdiction is in the discretion of the legislature. This is admitting a doubt in regard to a question upon which the legislature has acted. It is a well-settled principle of jurisprudence, that when there is a doubt of the constitutionality of any proposed legislative enactment, it should in any case be sufficient reason for refusing to legislate upon it, and if legislatures do not act upon this principle, the reasons upon which are based the judicial decisions sustaining legislation, will, in very many cases, cease to be in force.

In the case of *Armstrong v. Paul et al.*, 1 Nev., where the question of jurisdiction of justices of the peace arose upon a question of tort, and the justice had rendered judgment for over four thousand dollars, Judge Bronson says: "From the language of the act" (meaning the organic act of the territory) "there is no escape." The justice shall not have jurisdiction "when the debt or sum claimed shall exceed one hundred dollars." Can language be more explicit? There is no exception; it embraces all cases cognizable in justices' courts, whether they arise from contract or in tort. And upon reflection I am unable to see any good reason for the distinction claimed by counsel. Actions in tort are generally "more complex and difficult to dispose of than actions growing out of such contracts as usually come before a jus-

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tice of the peace. And when the law limits the jurisdiction in the more simple action to a certain fixed amount, it would reasonably follow *a fortiori* that the law would equally limit it in the more complicated case."

It must be borne in mind, that there is a broad distinction between the power of the territorial government and that of the states. The former has no inherent power; it is simply one of delegated powers. In ascertaining the powers of the territorial legislature, we examine to see what powers are expressly granted, or are necessarily implied for their exercise. The legislatures of the states only examine to see what powers are denied by the federal and state constitutions. And the inherent power of the state legislature extends to any act not prohibited by the constitution, for, without and beyond their limitations and restrictions, they are as absolute and uncontrollable as the parliament of Great Britain. To say that the intent of the instrument must prevail, that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them nor contemplated by its framers, is repeating no more than we have already said. If in any case the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded because we could give a narrower legal interpretation to certain words, and thereby vary the natural and common import of the language, when the words bear upon the same subject-matter, it must be one in which the absurdity and injustice of applying the words used to the substantive matter, would be so monstrous that all mankind would without hesitation unite in rejecting the application.

Acts void in part and valid in part; whatever may be said in regard to rejecting the excessive limitation provided by the legislature of the territory, it is a well-settled rule of law, that an act may be void in part, by reason of its violation of a constitutional provision, and good as to the remainder.

"If any part of the act be unconstitutional," says the supreme court of the United States, "the provisions of that part may be disregarded, while full effect may be given to

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such as are not repugnant to the constitution." So, when the legislature of the territory extended the jurisdiction of justices of the peace to five hundred dollars in criminal cases, the lesser constituted jurisdiction was included in the greater. And probably the jurisdiction, to the extent of one hundred dollars, is complete without any special statute upon the subject, though we would not deny but the legislature might limit the jurisdiction to less than one hundred dollars, if they saw proper to do so. We do not see, as contended by counsel, any necessary conflict of jurisdiction in the construction we have given. It is true there will be a concurrent jurisdiction between justices' courts and the district courts, when the fine or penalty is less than one hundred dollars. And it is absolutely necessary, for the better administration of justice, that this concurrent jurisdiction should exist.

All public offenses prosecuted in the district court must be prosecuted by indictment, except when the proceedings are had for the removal of district, county, or township officers. (See Idaho Stat. Crim. Prac., secs. 173, 174.)

Every public offense, not a felony, is a misdemeanor. (Crim. Practice, secs. 2, 3, 4.)

Misdemeanors of petty grades are punishable in justices' courts without indictment. Misdemeanors of higher grades are subjects of indictment and punishable by a fine superior and above the jurisdiction of justices of the peace. But who can tell the grade of punishment until the examination of witnesses? Suppose the justice commence the examination, and the evidence discloses a petty offense, then he ought to give the defendant a trial and pronounce a judgment of imprisonment, or fine, or both, within the limits of his jurisdiction. But suppose the evidence discloses an aggravated offense, where the judgment would exceed his jurisdiction, then the defendant should be bound over to answer any indictment that might be found against him. Suppose, on the other hand, the defendant should be indicted, and it should turn out on a full trial that the punishment should not exceed that punishment which a justice of the peace might have imposed. Should the district court suspend its judg-

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ment and send the defendant back to a justice's court for another trial, merely for the purpose of having a judgment rendered against him? We think the wisdom of the law in regard to this concurrent jurisdiction is plainly demonstrable. In fact, no better provision could be made. This concurrent jurisdiction in regard to minor offenses forms a harmonious system of criminal jurisprudence and lends itself to speedy and impartial justice.

The second and last ground of error is to the instruction to the jury. It appears that the malicious mischief was in the destruction of property of one Robie & Rossi, located on the public lands of the United States; and the court instructed the jury that Robie & Rossi were the owners of the property against all the world except the United States.

We can not see how the latent authority of the United States to set up its title to the public lands in our territory could be made a defense to a criminal action. Only two or three years ago every species of property in our territory was in the same condition, and a very small portion is owned in fee simple or in any other way at the present time. To say that every trespass, or civil action, could not be maintained for injury or conversion of this species of property because the United States might assert its title is certainly against reason and law.

In the case of *Winchester v. Shrewsburch*, 2 Scam. 283, where the plaintiff made rails from timber growing on government land, and left them piled up on the land, and defendant afterward purchased the land of the government and converted the rails to his own use, it is held "that the rails did not pass with the land, and the plaintiff could maintain an action of trespass against the defendant and recover the value of the rails taken."

In *Rogan v. Perry*, 6 Wis. 194, it is held "that any person cutting and cording up wood upon the unoccupied lands of another, that of itself is sufficient *prima facie* to enable him to maintain an action of trespass against the defendant, who took it and carried it away."

With these reasons we conclude that the rulings of the

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court below were correct, and that judgment must therefore be affirmed.

Judgment affirmed.

ON PETITION FOR A REHEARING.

NOGGLE, C. J., delivered the opinion.

In this case the opinion of the supreme court, affirming the judgment of the district court, was delivered by Justice Kelly on the twenty-sixth day of January, 1870. Afterwards and during the same term of the supreme court, the appellants filed their petition for a re-argument. In the said petition of the appellants no reasons are given, or authorities referred to, other than those already considered and passed upon by the court. The petition, therefore, offers no ground for a change in the judgment of the court, or for granting a re-argument.

The history of the case sufficiently appears in the opinion of the court delivered as aforesaid. We may have great respect for decisions of the supreme courts of other states in deciding cases similar in principle, and particularly California, because our laws are generally copies of laws of that state. The laws of California are founded upon the constitution of that state; our laws are founded upon our constitution, the organic act. California never had an organic act. That state never had a territorial organization under any such act. Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, Minnesota, and many other territories have been organized under organic acts like ours, and not one of the territories of the United States excepting Nevada ever attempted to confer upon justices of the peace greater jurisdiction in criminal than in civil matters, and the opinion of Justice Brosnan, of the supreme court of Nevada, indicates the respect of that court for the law.

We see no reason why the court should not adhere to the decision made in the case upon the first hearing. From the time the organic act took effect or went into operation, the district courts were, and still are courts of general jurisdiction, with power and authority sufficient to try, convict, and punish felonies and misdemeanors. Among other things,

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it is provided in section 9 of said organic act, that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be limited by law. Provided, That justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and the said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction."

We understand the organic act to be the fundamental law of the territory, within the spirit and meaning of which the legislative power must keep, and beyond which the territorial law-making power can not legally go. Under said section 9 the legislature might take from the district courts so much of their original common law jurisdiction, in criminal as well as civil cases, as it thought proper, and give such jurisdiction to justices of the peace. "Provided, That justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars."

In section 633 of the laws of the second session, on page 196, the legislature have attempted to limit the jurisdiction of justices of the peace in ten different cases, providing carefully in each case that the sum or damages claimed shall not exceed one hundred dollars.

In this section the legislature have attempted, in violation of the organic act, to confer upon justices of the peace equity powers, by providing "for the foreclosure of any mortgage, or the enforcement of any lien on real or personal property, when the debt secured does not exceed one hundred dollars."

No one will attempt to argue that this is not an assumption of power attempted to be conferred by the legislature upon justices of the peace, expressly prohibited by the organic law. This leads to a more careful examination of the six hundred and thirty-fifth section of this law, which confers criminal jurisdiction upon justices of the peace.

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By this law, we find justices of the peace authorized to hold courts for the trial of misdemeanors, punishable by fines not exceeding five hundred dollars.

Did congress intend to allow the legislature to confer upon justices of the peace criminal jurisdiction? and, if it did, was it the intention of congress that it should limit their jurisdiction in criminal as in civil cases?

It is frankly admitted by counsel upon the argument, that the first part of the paragraph of section 9 of the organic law, preceeding the "proviso," has reference to criminal as well as civil cases, and although the only office that the "proviso" in this case can perform, under any known rules of construction, is to qualify that part of the paragraph preceeding the "proviso," still the counsel for the defendants insist that all that part of the paragraph following the "proviso," refers only to civil cases, notwithstanding no such language is used.

In every proceeding in court against a criminal, when by law a fine may be imposed for any amount, no matter whether that amount be great or small, the extent of the amount of fine that may be imposed may be properly construed to be the sum in law claimed by the prosecution, and when the law imposes a fine exceeding one hundred dollars, jurisdiction can not be conferred upon a justice of the peace in such a case.

Section 9 of the organic law either thus restricts the legislature or it entirely fails to confer upon the law-making power the right to pass any law, conferring, limiting, or fixing the jurisdiction of justices of the peace in criminal cases. If that portion of section 9 of the organic law following the "proviso" has no reference to criminal offenses, by what rule of construction can we understand that all that portion of the paragraph that precedes the "proviso" refers to criminal as well as civil matters.

It seems so clear that there can scarcely be room for a doubt that if that which follows the "proviso" refers only to civil matters, that which precedes it must do the same and can do no more. If such is the case and it refers only to civil matters, then the legislature did not possess the

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power to confer upon justices of the peace any jurisdiction to hear, try, and determine criminal matters, and that being so, there can no longer be a doubt that the district court still retains and may entertain original jurisdiction in all misdemeanors as well as felonies. Such would be a strict construction of the act.

The organic law places no more direct restriction upon the legislature in limiting the jurisdiction of probate courts. In the case of *Landon v. Bartly*, tried in Boise county, before Chief Justice McBride at the October term, 1865, as may be seen by referring to 1 Idaho reports, 219, by Cummins, the court unhesitatingly declared the act of the legislation conferring civil and criminal jurisdiction upon probate courts, unauthorized, null, and void, and for such reasons as do most fully sustain the doctrines contended for in the opinion of the court in this case.

We are told that common law offenses do not exist against the general government; this is true, and we do not see how it could be claimed otherwise. Legal gentlemen understand that our United States district and circuit courts are courts of limited jurisdiction, and do not in any general sense possess common law jurisdiction.

The case at bar is not pending in a United States court; but it is pending in a territorial court, established by act of congress, and the offense charged in the indictment is made a misdemeanor at common law, and also by the statute law of the territory, and no such offense is created or known under the laws of the United States. The case was commenced and tried in a court of general jurisdiction, original and unlimited, like the state, district, or circuit courts of a state in the union. It is true that the organic act provides, that "each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States." This does not change the name of the district court of the territory; it is a mere addition to the powers of that court, without affecting its organization. As these questions are not in this case, it is unnecessary to comment further upon them.

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The district courts of Idaho territory having been created as common law courts by the organic law, when fully organized for the transaction of legal business, were then courts of record, possessing general and unlimited criminal as well as civil jurisdiction; then they had the power to cause to be apprehended, to try, convict, and punish any offender guilty of felony or of a misdemeanor of the first class *mala in se*, or penal at common law.

Misdemeanors are divided into two classes: 1. Such as are *mala in se*, or penal at the common law; 2. Such as are *mala prohibita*, or penal by statute. (1 Whart. Am. Crim. L. 2.)

“Whatever mischievously affects the person or property of another, or openly outrages decency, or disturbs public order, or is injurious to public morals, or is a breach of official duty, when done corruptly, is the subject of indictment and belongs to the first class of misdemeanors, *mala in se*, or penal at common law.” (1 Whart. Crim. L. 2.)

On page 3 of the same book, Wharton says: “The consequence was that whenever a wrong was committed, which, if statutory remedies alone were pursued, would have been unpunished, the analogies of the common law were extended to it, and it was adjudged, if the reason of the case required it, an offense to which the common law penalties reached.”

Punishment of offenses at common law were just as complete before there was any statute of punishment enacted, as afterwards. We may repeat that the books in which the law should be found are greatly at fault, or misdemeanors of the first class, “penal at common law,” may still be punished at the common law; notwithstanding a statute may have been enacted providing for a different punishment of the same offense, unless the legislative act clearly and explicitly takes away the right of trial at common law, or from common law courts, by positive enactment within the constitutional authority of such legislature, the common law power of the court can not be destroyed by mere implication.

The errors contended for in this case consist in a failure to understand the distinction between the two classes of mis-

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demeanors; of those penal at common law, and those penal by statute; "wherever a statute creates an offense and expressly provides a punishment, the statutory provisions, as will be seen more fully hereafter, must be followed strictly and expressly." * * * "Where a statute attaches a new penalty to that which was an offense at common law, either the remedy by statute or that at common law can be pursued." * * * "And if the statute specify a mode of proceeding different from that by indictment, then if the matter were already an indictable offense at common law, and the statute introduced merely a different mode of prosecution and punishment, the remedy is cumulative, and the prosecutor has still the option of proceeding by indictment at common law, or by the mode pointed out by statute." (1 Whart. Am. Crim. L. 10.)

This is clearly so, unless by direct and positive enactment the jurisdiction has been taken from the common law court which has not been done in Idaho territory. The first chapter of Sedgwick on statutory and constitutional law, from page 1 to 25, and the first chapter of Wharton's American criminal law from page 1 to 13, afford much valuable authority in support of the foregoing propositions.

Unless the organic act confers upon the legislature the power to give justices of the peace criminal jurisdiction to hear, try, determine, and punish crimes and misdemeanors, then clearly it is not in the power of the legislature to confer upon justices of the peace any such jurisdiction. If the organic act does not clearly and explicitly give the legislature the power to confer such jurisdiction, then a justice of the peace, in criminal matters, is a mere peace officer and an officer for the examination of offenses, for the purpose of holding offenders to bail, etc., and has no right or power to hear, try, or determine any criminal matter whatever, and all laws, assuming to confer upon justices of the peace such jurisdiction are without authority and void, and can have no force and effect. Admitting, however, that the law which attempts to confer jurisdiction upon justices of the peace in such cases as this is a valid and binding law, still the prosecution would be at liberty to proceed in either

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court, unless the jurisdiction is taken from the district court by a direct and positive law, and until such a law is passed the jurisdiction of the two courts in such matters is concurrent.

While we are told in this case that the provisions of the statute must be strictly followed, we are also referred to page 405 of Sedgwick on Statutory and Constitutional Law in support of the declaration aforesaid. We are unable to so understand the law from this authority. On this page (405) Sedgwick says: "The analogy of these rules holds good in the criminal law. Thus when an offense intended to be guarded against by statute, is punishable before the making of any statute prescribing a particular method of punishment, then such particular remedy is merely cumulative, and does not take away the former remedy." The offense charged in this indictment being a case of mischievously destroying the property of Robie and Rossi, it was a misdemeanor of the first class, penal at the common law, *mala in se*, and it is not a misdemeanor of the second class penal by statute, *mala prohibita*; therefore the reference can not strengthen the defendants' case, but clearly sustains our decision.

Misdemeanors of petty grades are punishable in justices' courts; misdemeanors of higher grades are subject to indictment, and punishable by fine above the jurisdiction of justices of the peace. Suppose we adopt the defendants' theory that all misdemeanors are punishable by fine, etc., not exceeding five hundred dollars, and therefore not indictable; can the justices punish by a large fine? Are there no greater misdemeanors? If we are not mistaken there are several punishable by larger fines. Section 101, on page 496 of the first session laws, names an offense punishable by fine in the sum of two thousand dollars. Section 13, on page 49 of the fourth session laws, names a crime punishable by a fine not exceeding one thousand dollars, and so we might extend the reference, but sufficient has been noticed to show that there are offenses known as misdemeanors that can only be tried in the district court after

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first having been indicted, because of a punishment by a fine larger than five hundred dollars.

Our organic act is in substance like the acts for the organization of all the other territories. The same provisions and the same "proviso" that is in section 9 of our act is substantially the same in each of the acts organizing all other territories since the organization of the north-west territory. The language of each being substantially like section 9 of our act. The legislatures of all the territories in limiting the jurisdiction of justices have, with a single exception, construed such provision in their organic acts as a restriction in criminal as well as civil cases, and so far as reference has been made in the argument on the part of the defendants, appellants, it is not contended that any of the territories heretofore organized under a similar law, with the exception aforesaid, has ever undertaken to confer upon justices of the peace greater jurisdiction in criminal than in civil matters.

If this power, under the language of the act, was even doubtful, it has been so long and so uniformly adopted and acquiesced in, that it has become a law settled and approved by usage and custom. It is now rather late to declare, that the organic law has no reference to criminal matters, and therefore the legislature may, without regard to any law of congress, confer upon justices of the peace, in criminal matters, any jurisdiction thought proper. In other words, is it of less importance—does it require less experience, or less legal ability, to conduct the trial of an offender charged with crime that may be punished by a fine of one hundred dollars, than it does to adjudicate books of accounts, a promissory note, or any other civil demand of one hundred dollars? Or, are criminal matters and criminal prosecutions more important to both the people and the offender, and are they generally more complex and difficult to dispose of, than actions growing out of such contracts as usually come before a justice of the peace? These are questions of legal importance to the law-abiding citizens of this territory, and they have a right to have them fairly and candidly answered by the court. In the language of Justice

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Brosnan, in delivering the opinion of the supreme court of Nevada (1 Nev. 141), this court may answer these important questions of jurisdiction by saying, that "when the law limits the jurisdiction in the more simple action to a certain fixed amount, it would reasonably follow *a fortiori*, that the law would equally limit it in the most complicated case.

It is hardly fair to assume for the purpose of sustaining the law, that the legislature were actuated or induced to enact the law because money was so abundant in this territory that in the opinion of the legislature a fine of five hundred dollars is not more, proportionally, in Idaho, than a fine of one hundred dollars in an eastern state or territory. We do not think the legislature was actuated by any such motives. Mistakes are neither criminal nor uncommon, and it is certainly more charitable to believe that the law is the result of an innocent and thoughtless mistake than to believe that a legislature selected by the intelligent people of Idaho could make so great a mistake as to intentionally enact that the abundance or scarcity of money could affect a criminal case, while by the same law they declare in effect that it shall not affect a civil case. Our confidence in the intelligence of the legislature that enacted the law will not permit us to conclude that its members labored under the impression that it did not require just as much money to pay a fine of one hundred dollars, and as much experience and ability to adjudicate it, as a civil demand for the same amount.

As to the remaining point in the case, it may be passed without saying more than has already been said in the opinion of the court in this case. Until some authority can be found sustaining the views of the defendants, appellants, and being confident that none can be found, and that none such exists, and believing that the cases before referred to in the opinion of the court are a complete answer to the positions taken by the defendants, appellants, further comment is omitted.

We are therefore of the opinion that the rehearing be denied, and that the judgment of the district court be

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affirmed at the costs of the defendants in this court, and that the district court be by the order of this court directed to execute the judgment and sentence of that court pronounced at the last term thereof.

D. M. CHANDLER, APPELLANT, v. CRAVEN LEE, RESPONDENT.

STATUTES—STATUTORY CONSTRUCTION.—Different acts, passed by the legislature on the same day, upon the same subject-matter, will be read together as parts of the same act.

IDEM.—It is the duty of courts to execute laws according to their true intent and meaning; and that intent, when collected from the whole and every part of the act, must prevail over the literal sense of the terms, and control the strict letter of the law, when the letter would lead to possible injustice, contradiction, or absurdity.

APPEAL from the second judicial district, Alturas county.

R. E. Foote and John C. Henly, for the appellant.

J. Brumback, for the respondent.

Opinion by LEWIS, J.; NOGGLE, C. J., and KELLY, J., concurring.

This cause was tried by the court on an agreed statement of facts. Judgment for the defendant, and the plaintiff appeals. In 1866, one Sayers, in pursuance of law, transcribed certain records for Alturas county, and in 1869, after sundry legislation thereon, delivered the said records to the receiver of said county, and received warrants for the sum due him therefor on the "current expense fund." The plaintiff is the owner of one of these warrants for the sum of two hundred dollars. The warrant was registered by the defendant, as treasurer of Alturas county, on "the current expense fund," and there is no fund in said fund, nor any provisions of law by which there will be any, with which to pay the warrant. There is money, however, in the current expense and redemption fund with which to pay it, but the treasurer refused to pay it from that fund. And plaintiff asks a peremptory mandate to compel the defend-

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ant, as such treasurer, to pay this warrant from the current expense and redemption fund.

The legislation on this subject is as follows: At the third session an act was passed, requiring the recorder of Boise county to transcribe the records in his office properly belonging to Alturas county, and the auditor of Alturas county was required to draw a special warrant for the sum due therefor, payable out of any money in the treasury not otherwise appropriated. (Laws Third Ses. 217.) At the fourth session an act was passed, fixing the sum due, and ordering the auditor of Alturas to issue his warrant therefor on the delivery of the records, to be paid out of the first moneys "which may come into the treasury of Alturas county after the passage of the act." (Laws Fourth Ses. 112.) At the fifth session, an act was passed, requiring the auditor, in the presence of the board of commissioners, to determine the amount due, and draw his warrant therefor on the treasurer of Alturas county, on the current expense fund of said county. (Laws Fifth Ses. 122.) This act was passed on the fifteenth of January, 1869, and on the same day an act was passed to provide for the redemption of, and manner of redeeming, outstanding warrants, etc., for Alturas county. (Laws Fifth Ses. 139.) By the provisions of this act a fund was created, called the "current expense and redemption fund."

Section 9 of said act provides that it shall be unlawful for the treasurer of Alturas to pay any warrants or claims issued or accrued prior to the passage of the act, otherwise than in accordance with its provision; and by section 11: "No warrants shall, after the passage of the act, be drawn on the general fund, forty-five per cent. fund, or county court-house and building fund, but all the current expenses (except for school purposes), shall be paid out of the "current expense and redemption fund." Hence, in accordance with the literal and technical construction of the statute, the warrant is ordered to be drawn upon a fund, to wit, the "current expense fund," which has no existence. These two acts, however, were passed upon the same day, and relate to the same subject-matter; hence they are according

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to a well-settled rule of interpretation, to be read together, as parts of the same act. (*People v. Jackson*, 30 Cal. 427.)

It is the duty of courts to execute laws according to their true intent and meaning; and that intent, when collected from the whole and every part of the statute taken together, must prevail even over the literal sense of the terms and control the strict letter of the law, when the letter would lead to possible injustice, contradiction, and absurdity. (*Ex parte Ellis*, 11 Cal. 223; *Knowles v. Yeates*, 31 Id. 82.) In the construction of a statute it is an invariable rule to start out with the assumption that some effect is to be given, if possible, to every provision of the statute. (*People v. Waterman*, 31 Cal. 412.)

Where a particular construction of a statute applied to a case which it seems by its terms to include, there follows from such construction an absurd consequence; respect for the legislature will induce the court from thence to conclude, that some other construction, which will not produce such a consequence ought to be adopted. Hence, every construction which leads to an absurdity ought to be rejected. (Sm. Com., sec. 518.)

It would be absurd of course to hold that the claim in the case before us is payable from the "current expense fund," and that an order should be drawn on that fund, for as a matter of fact there is no such fund. The legislature most clearly intended that this claim should be paid, and looking at both statutes passed on the fifteenth of January, 1869, there can be no question but that it was the intention of the legislature that the claim should be paid from the same fund as that from which the current expenses of the county are paid, which they have said is the "current expense and redemption fund." In fact, they by the act, on page 122, in effect declare that the claim shall be considered as a claim for current expenses of the county. The county needed the records; it was very important that they be placed on file in the proper office. Mr. Sayre had done the work, and the legislature attempted to provide for paying him. That being the case, it is the duty of the court to so construe these laws as will give effect to the legisla-

Points decided.

tive will; and we conclude that by a fair and reasonable construction of these statutes, by the light of the rules above laid down, that this claim was and is properly payable from "the current expense and redemption fund" of Alturas county, and it was the duty of the auditor to draw his warrant upon that fund for the claim herein.

But it seemed that this warrant was drawn upon a fund which has no existence. Will this court compel the treasurer to pay from one fund a warrant drawn upon a fund that does not exist? It is the command of the law that every warrant drawn upon the treasury shall distinctly specify from what fund the same shall be paid. And it is the duty of the treasurer to pay warrants from the funds specified therein, and from no other. Before the payment of any warrant the treasurer must see to it that it be drawn on some specific fund known to the law; hence, in the case at bar, the warrant being drawn on a fund that does not exist, the court will not compel the treasurer to pay it from any other of the funds of the county.

We suggest, however, that as the claim in question is by law payable from the current expense and redemption fund of Alturas county, that the plaintiff is no doubt entitled to a warrant on that fund for the sum due on his warrant, and that on demand and surrender of his warrant, the auditor may receive and cancel the warrant in controversy and issue to plaintiff a warrant on the proper fund, and if he refuses so to do the law gives him his remedy.

The order of the court below denying the mandate is affirmed.

JACOB DIEHL, RESPONDENT, v. S. G. HULL AND C. H. HULL, APPELLANTS.

COMPLAINT—APPELLATE COURT.—Where an action is tried in the district court upon its merits, and a finding of facts is made and judgment rendered thereon, no exceptions being taken, the only question that will be considered by the supreme court is whether the complaint states facts sufficient to warrant the judgment.

APPEAL from the second judicial district, Ada county.

Opinion of the Court—Lewis, J.

A. Heed, for the appellants.

H. E. Prickett, for the respondent.

LEWIS, J., delivered the opinion. NOGGLE, C. J., and KELLY, J., concurred.

This is an action of replevin, brought to recover certain personal chattels. Answer, general denial and plea of property in defendant. Judgment for plaintiffs and defendant appeals. No motion for a new trial was made in the court below, and no exceptions taken. The case was tried on its merits.

The only question before us for consideration is, whether the complaint states facts sufficient to warrant the judgment. The defendant it seems was of the opinion that the complaint was good, as he took issue thereon and went to trial on the facts. While it is not, perhaps, such a complaint as we would adopt for a precedent in like cases, still we think, taking the facts stated as a whole, that the judgment is fully warranted on the pleadings and findings of the court. The judgment of the district court is affirmed.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT,
JANUARY TERM, 1871.

PRESENT:
HON. DAVID NOGGLE, CHIEF JUSTICE.
HON. JOHN R. LEWIS, } JUSTICES.
HON. W. C. WHITSON, }

THE PEOPLE, RESPONDENTS, *v.* HENRY MYERS AND
THOMAS McDONALD, APPELLANTS.

PLEADING—COMPLAINT—RECOGNIZANCE.—An allegation in a complaint, that
“a recognizance was made and duly delivered” must be held to mean
that it was returned to the clerk of the court, as required by law; and
such allegation is sufficient.

TITLE—RECOGNIZANCE.—The “people of the territory of Idaho” and “the
people of the United States in the territory of Idaho,” are substantially
the same; hence, a recognizance executed to “the people of the territory
of Idaho” is a substantial compliance with section 503 of the criminal
practice act, and an action may be maintained thereon, in the name of
the people of the United States in the territory of Idaho.

APPEAL from the third judicial district, Owyhee county.

J. W. Huston, for the appellant.

L. P. Higbee, for the respondent.

LEWIS, J. delivered the opinion. NOGGLE, C. J., and
WHITSON, J., concurred.

This action is brought upon a recognizance. It is alleged

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APPEAL from the third judicial district, Owyhee county.

J. W. Huston, for the appellant.

L. P. Higbee, for the respondent.

LEWIS, J. delivered the opinion. NOGGLE, C. J., and WHITSON, J., concurred.

This action is brought upon a recognizance. It is alleged

Opinion of the Court—Lewis, J.

in the complaint that on the third day of April, 1868, at Owyhee county, the defendants made and duly delivered a written recognizance, a copy of which is set out, wherein it is recited, that on the third day of April, 1868, an order was made by James Lyom, a justice of the peace in and for Owyhee county, that John Fisher be held to answer upon a charge of assault with intent to commit murder, upon which he has been duly admitted to bail in the sum of two thousand five hundred dollars; that defendants undertook that said Fisher shall appear and answer the said charges, etc., or if he fail to perform any or either of the conditions, that defendants will pay to the people of Idaho territory the sum of two thousand and five hundred dollars," and it further appears that the defendants duly justified as such bail.

It is further alleged in the complaint, that the grand jury at the June term of the district court for Owyhee, found and presented a true bill of indictment against Fisher, upon the charge of an assault with intent to commit murder, which was filed, as required by law; that on the eleventh of June, the defendant, Fisher, was by order of the court, and in open court, duly called to answer said indictment, but came not, and that thereupon an entry was made of record that said Fisher had failed to appear and answer said indictment, and the recognizance was declared forfeited; that no part of the same has been paid. The defendant McDonald interposed a demurrer to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendants electing to stand thereon, and having failed to answer, judgment was rendered for plaintiff for the sum claimed with costs. Defendants appeal.

The sole question before this court for consideration, is this: "Does the complaint state facts sufficient to constitute a cause of action?" It is insisted by the defendants that the complaint is insufficient for several causes, among which are the following:

1. That the suit is brought in the name of the people of the United States, in the territory of Idaho, plaintiffs, while

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the recognizance is executed to “the people of the territory of Idaho.”

2. That it does not appear that the recognizance was delivered to any person authorized to receive it.

The recognizance is an exact copy of that set out in section 503, Criminal Practice, except that the form therein given is to the people of the United States, in the territory of Idaho, while in the case at bar it is executed to the people of the territory. Section 588, Criminal Practice, provides that “neither a departure from the form and mode prescribed by this act, in respect to any pleadings or proceedings,” nor an error or mistake therein, shall render the same invalid, unless it have actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right.

In the case of the *People v. Bugbee*, 1 Idaho, 96, it was held by this court that the people have the legal capacity to sue upon breaches of bonds given by defendants in criminal actions. In *Tevis v. Randall et al.*, 6 Cal. 632, it was held that an official bond made to “the people of the state of California” is sufficient though the statute required it to be made to the state of California.

The people of Idaho territory and the people of the United States in the territory of Idaho are substantially the same, and the defendants are in no way prejudiced in this case by so holding. We think the recognizance is sufficient as to the second point. Section 172 of the criminal practice act declares that the magistrate shall return to the clerk of the district court all recognizance of bail. It is alleged that the recognizance was made, and duly delivered. These allegations must be held to mean that such recognizance was returned to the clerk as required by law, and he was clearly authorized to receive it without examining the other points raised by counsel. We are clearly of opinion that the complaint is sufficient, and the judgment of the district court is, therefore, affirmed.

Opinion of the Court—Noggle, C. J.

THE PEOPLE, APPELLANTS, v. JAMES LYNCH AND
PATRICK KELLY, RESPONDENTS.

APPEAL—RECORD—NOTICE OF APPEAL—PRACTICE.—An appeal is taken by filing and serving notice thereof, as required by statute, and the record on appeal must show that such notice was so filed and served, or the case will be dismissed out of this court for want of jurisdiction.

APPEAL from the third judicial district, Owyhee county.

L. P. Higbee, for the appellants.

F. E. Ensign, for the respondents.

NOGGLE, C. J., delivered the opinion of the court. LEWIS and WHITSON, JJ., concurred.

This case is presented to this court by the district attorney acting for Owyhee county, claiming that the district court erred in quashing the indictment returned by the grand jury of that county, at the June term of the district court, in 1869, against the defendants; because there was not a full panel of the grand jurors present reporting the indictment, one of the seventeen who were impaneled, charged, and sworn as such, being absent. Under the head of appeals in criminal cases, on page 270 of the criminal practice act, second session, "section 473, an appeal may be taken by the service of a notice in writing on the clerk of the court in which the action was tried, stating that the appellant appeals from the judgment."

The appeal may be taken in this manner by either the people or the defendant. In this case there is nothing in the record to show that any such notice was even served or filed, or that any attempt has ever been made to remove this case from the district to this court, and this court has no jurisdiction in this case.

Therefore this case is dismissed out of this court for the reason that the supreme court has no jurisdiction therein.

Opinion of the Court—Whitson, J.

R. S. PRIDGEON, APPELLANT, v. HENRY GREATHOUSE, RESPONDENT.

STATUTE OF LIMITATIONS.—The statute of limitations begins to run from the time when the action might properly be commenced.

IDEM.—A law extending the time within which actions may be commenced, can only affect causes of action existing at the time of its passage. It can not revive causes of action already barred; and as to existing causes of action, the time must be computed from the period when the action might have been commenced, and not from the passage of the law extending the time.

APPEAL from the second judicial district, Ada county.

Rosborough & Preston, for the appellant.

H. E. Prickett, for the respondent.

WHITSON, J., delivered the opinion. NOGGLE, C. J., and LEWIS, J., concurred.

This action was commenced on the seventh day of January, A. D. 1869, in the district court of this territory, in and for Ada county, to recover a judgment obtained by R. S. Pridgeon against Henry Greathouse, in the state of Texas, on the nineteenth day of April, A. D. 1858. The defendant pleaded in the court below that he was not liable under the laws of this territory upon said judgment, for the reason that plaintiff's cause of action was barred by the statute of limitations of the territory.

The court below held for the defendant, and the plaintiff appeals to this court. The defendant had been a resident of this territory continuously from the fifteenth day of May, A. D. 1863, to the commencement of this action. The first statute providing the time within which an action might be commenced in this territory was passed January 23, A. D. 1864. Section 34 of that act, page 558 of the first session laws of Idaho, provides that an action upon any judgment, etc., obtained out of this territory, etc., can only be commenced within two years from the time the cause of action shall accrue. Could not Pridgeon have commenced his action on the twenty-fourth of January, A. D. 1864? We think he could. Then had not his cause of action ac-

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crued? It certainly had; and he must bring his action within two years from that time. But before the cause of action had lapsed, an act had passed January 10, A. D. 1866, which provided that all such actions should "be commenced within three years after the party making such liability shall be a resident of this territory."

The phraseology of the section is changed a little, but it is evident that, in substance, nothing is changed, except the time within which such actions should be commenced. The section, as first passed, was evidently intended to require a person holding a foreign judgment to prosecute it within a certain time after the courts here might obtain jurisdiction of the person of the defendant; or, in other words, that the action should be commenced within two years from the time the defendant became a resident of this territory, without, however, giving him the benefit of any time during which no law had been passed on the subject.

Section 34, as amended, we conclude, therefore, only extended the time within which Pridgeon was obliged to commence his action, and instead of having two years from January 23, 1864, he had three. Nearly two years elapsed after the expiration of the three years before this action was commenced. The time within which this action should have been commenced must, we think, be deemed to have lapsed at the expiration of the three years within which it might have been properly commenced.

There is no doubt but that remedial statutes may be passed, which can only extend the time of commencing actions, computing from the time the cause first accrued, and not from the date of the law extending such time. This action was commenced only one day before the expiration of the three years provided by the act of January 10, A. D. 1866, which barely saved this action within its provisions, computing from the date of the passage of the act, which we think can not be done.

If this act had been passed on the twenty-fifth day of January, A. D. 1866, when the two years had already run against it, the cause of action would have been dead, and no amount of remedial legislation could have revived it any

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more than the material body of man can be brought to life when once dead; but the two years having not yet run, its life was extended one year longer than it would have lived had the act of January 10, 1866, not been passed. Why should Pridgeon be allowed the almost ten years which he had under the act of 1864, and then be allowed the additional three years provided by the act of 1866?

If such a construction of the statute of limitations should prevail, as is insisted upon by the appellant, the effect would be to extend, indefinitely, the time within which an action might be commenced; and not only that, but would revive causes of actions which had long ceased to exist.

We do not think the court below erred in its judgment.

Judgment affirmed.

**JOSHUA HULL, RESPONDENT, v. SAMUEL G. HULL
AND CHARLES H. HULL, APPELLANTS.**

CLAIM AND DELIVERY.—To support an action of claim and delivery, the property must be a personal chattel at the time of the taking, and not something which has been turned into a chattel by reason of having been separated from the freehold by the defendant.

IDEM—COMPLAINT—PLEADING.—If the property claimed be so mixed with other property that a delivery of the specific article can not be made, and the plaintiff fails to ask judgment for its value in case it can not be delivered, the action of claim and delivery can not be maintained. •

APPEAL from the second judicial district, Ada county.

Rosborough & Preston, for the appellants.

H. E. Prickett, for the respondent.

WHITSON, J., delivered the opinion of the court. **NOGGLE, C. J.**, and **LEWIS, J.**, concurred.

The plaintiff and respondent commenced an action in the district court of Ada county, on the twentieth day of August, A. D. 1868, alleging in his complaint that he was the owner and in the possession of about seven thousand five hundred sheaves, containing five hundred bushels of wheat, of the value of six hundred dollars; and being so in possession, the defendant, on the seventeenth and eighteenth days

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of August, A. D. 1868, in said county of Ada, without the plaintiff's consent, and wrongfully, took said property, goods, and chattels from the possession of the plaintiff, and wrongfully detained the same. Plaintiff then demands that defendant be adjudged to deliver said property to him, etc.

The answer of defendant denies every material allegation of the complaint, and then sets up, by way of defense, as new matter, that they have been in possession of the land upon which this grain grew from 1866, to and including the time during which the grain grew, was harvested, and taken off of the land by them, and that they plowed the ground, and sowed and harvested the grain. They further claim to have been tenants under one John Lawless, who claimed the land under the pre-emption law.

The court below tried the case without a jury, and gave judgment for the plaintiff for a redelivery of the property, or for six hundred dollars, if the property could not be had. The defendants moved for a new trial, which was refused, and they appeal to this court from such refusal.

The evidence shows:

1. That defendants had been cultivating this land ever since 1866, including the time they raised the grain, and that they were in possession thereof.

2. That at the time this grain was raised and harvested by defendants, the land upon which it grew was in dispute between Joshua Hull, who claimed to hold it under the homestead laws, and John Lawless, who claimed to hold it under the pre-emption laws of the United States.

3. That these defendants were tenants under Lawless, and by his permission.

4. That neither Joshua Hull nor Lawless had any further possession than that which they held by virtue of their claims under the laws of the United States, neither of them having lived on the land until after the commencement of this action.

5. That at the time the grain was harvested and taken off of the land, the dispute between Joshua Hull and Lawless had not been settled in the general land office of the United States, and that title was yet in the government.

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This action was prosecuted as the old common law action of replevin. To support such an action the property must be a personal chattel, at the time of taking, and not something which has been turned into a chattel by reason of having been separated from the freehold by the defendant. (2 Bouv. Law Dict. 449.) It might be questioned even if plaintiff had been the owner in fee of the land upon which this grain grew, whether he could have maintained this action against defendants when they had been in possession of the land long before plaintiff filed his homestead application.

There can be no doubt we think, in this case, when the land was in dispute between Joshua Hull and Lawless, but that they were entitled to all the rights of Lawless, for, in addition to their possession, they had the permission of Lawless.

It certainly will not be contended that Joshua Hull could have maintained this action against Lawless. (See *Page v. Fowler*, 28 Cal. 605.) We think the position equally as tenable that no such action could be maintained against the defendants, who not only had all the right Lawless could give, but had had the quiet and peaceable possession of the land since 1866.

The evidence further discloses that the grain was mixed with other grain, and that it could not have been delivered to plaintiff; and while it is alleged in the complaint that the wheat was worth six hundred dollars, there is no prayer or demand for judgment for any amount of money in case the property could not have been delivered. No action of this kind will lie in a case where the property can not be designated or separated from other property of the same kind. We think the court below erred, and that a new trial should have been granted. Causes remanded for a new trial, and judgment of the court below reversed.

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THE UNITED STATES, APPELLANT, *v.* HORACE C.
GILSON ET AL., RESPONDENTS.

PRACTICE—APPEALS—WRITS OF ERROR—BILLS OF EXCEPTION.—The legislative assembly has authority to regulate the mode of taking and allowing writs of error, bills of exception and appeals; and such regulations, when made, apply to all cases, whether arising under the laws of the United States, or of the territory.

WRITS OF ERROR—APPEALS.—A writ of error is the proper mode of bringing before this court, for review, actions at law; and suits in chancery must be brought up by appeal.

IDEM.—A common law action can not be re-examined in this court on appeal, but must be brought up by writ of error.

APPEAL from the second judicial district, Ada county.

Rosborough & Preston, for the appellant.

H. E. Prickett, for the respondent.

Opinion by LEWIS, J. WHITSON, J., concurred. NOGGLE, C. J., dissented.

This action is brought upon an official bond executed by the said Gilson as principal, and the other defendants as sureties, to the United States, conditioned that the defendant Gilson should truly perform the duties of the office of secretary of Idaho, and would account for all moneys by him received as such officer.

The breach alleged is that said Gilson has wholly failed to so account, but on the contrary has received from plaintiff the sum of thirty-three thousand dollars, and has neglected and refused to account for the whole or any part thereof. The case was tried at the April term, 1870, before the court and a jury, and a verdict rendered for defendants. Judgment was rendered on the verdict that the complaint be dismissed on the merits of the action.

The plaintiff thereupon filed a motion to vacate the verdict and to grant a new trial, upon the ground that the evidence was insufficient to justify the verdict, and plaintiff also filed a statement setting out the evidence given on the trial. The court denied the motion for a new trial; from

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which order denying the motion for a new trial the plaintiff appealed.

The defendants have filed in this court a motion to dismiss the appeal, because:

1. Said action is an action at common law, and the facts at issue were tried by a jury; hence this court can not review the case or revise the judgment, except by means of a writ of error. The question has been raised by counsel in the discussion of this case, whether the courts of the territory are courts of the United States; and whether, as such courts are by the seventh amendment to the constitution prohibited from examining a suit at common law, otherwise than in accordance with the rules of common law, as to facts tried by a jury, this court has jurisdiction to examine the case before us otherwise than by writ of error.

For the purpose of disposing of this motion it is not necessary to determine as to the question whether or not these are United States courts. It is clear that the district courts have the same jurisdiction in causes arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States. That by the provisions of the organic act writs of error and appeals are allowed from the final decisions of the district court in causes arising under the laws of the United States, the same as in other cases; and that as the organic act confers upon the legislature the power of regulating the mode of taking and allowing writs of error, bills of exceptions, and appeals; such regulations, when so made, apply to all cases, whether arising under the laws of the United States or of the territory. That in the plain language of the act, "Writs of error, and appeals from the final decisions of the supreme court, shall be allowed and taken to the supreme court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States."

Congress, therefore, has regulated the manner of allowing writs of error and appeals from this court to the supreme court of the United States, and the supreme court of the United States has decided that the manner of exercising

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its appellate jurisdiction is, in suits of common law, by writ of error, and in equity and admiralty cases by appeal; and have dismissed appeals and writs of error, when not taken to said court in accordance with such rule. (*The San Pedro*, 2 Whart. 137; *McCollum v. Eager*, 2 How. 63.) The courts of this territory are created by the organic act, and their jurisdiction and powers must be ascertained by the provisions of said act, and the laws of the territory passed in pursuance thereof. Both the district and supreme courts are, by the express terms of the act, clothed with chancery and common law jurisdiction; and the legislature have no authority to abridge such jurisdiction, nor has the legislative assembly made any attempt so to do.

But congress, by the provisions of said act, section 9, has delegated to the legislature certain powers—as to limiting the jurisdiction, and regulating writs of error, bills of exceptions, and appeals. First as to their original and appellate jurisdiction. The language of the organic act is, that the jurisdiction of these courts shall be both as to their appellate and original jurisdiction, limited by law, and the legislature have accordingly provided by law, that the jurisdiction of the supreme court shall be appellate. (Sec. 609, Crim. Prac.) That the jurisdiction of the district courts shall be both original and appellate. (Secs. 613 and 614, Civ. Prac.) Hence, by the provisions of the organic act and the laws of the territory, this court has appellate jurisdiction.

How shall this appellate jurisdiction be exercised? The organic act in very plain and positive language declares, that writs of error, bills of exceptions, and appeals shall be allowed in all cases, from the final decisions of the district courts to the supreme court, under such regulations as may be prescribed by law. Congress, therefore, has not delegated the power to the legislature to say in what cases writs of error and appeals may be allowed, but have emphatically declared, in language that is plain and not to be misunderstood, that they shall be allowed in all cases. The act, however, does not prescribe the mode in which they shall be allowed, but expressly provides that they shall be allowed,

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under such regulations as may be prescribed by law, thus giving to the legislature the power to prescribe the regulations as to the manner in which they may be taken and allowed.

The declaration of the act is, that “writs of error, bills of exceptions, and appeals shall be allowed.” These words have a technical and well-understood meaning. “Writs of error” are known to common law proceedings, but an appeal is not; but writs of error and appeals are the modes pointed out by congress whereby common law, equity, and admiralty causes may be reviewed and re-examined in the supreme court; and when congress uses these words in the organic act, it must be considered that they used them in accordance with the sense and meaning that had been given them by the supreme court of the United States. There is no doubt but that they were so used and intended to be understood in the same section, in providing for writs of error and appeals from this court to the supreme court of the United States.

If this be the sense in which these words were used, it follows that the true interpretation of that clause of the organic act is this: that writs of error and bills of exceptions shall, in suits at common law, be allowed and taken, and appeals in equity and admiralty cases shall be allowed from the district to the supreme court; and that the power is conferred upon the legislature to regulate the manner and prescribe the rules of practice in taking and allowing them.

The territorial legislature, most clearly then, has the power to prescribe and regulate the manner whereby writs of error, bills of exceptions, and appeals may be allowed; and in the exercise of the powers herein conferred, the legislature, by the provisions of sections 191 to 194 inclusive, regulated the manner of taking and allowing bills of exceptions. By the provisions of sections 218 to 306 inclusive, of the civil practice act, the manner of taking appeals is regulated; and by the provisions of sections 312 to 326 inclusive, of civil practice, the manner of allowing writs of error is regulated. Section 312 declares that every final judgment, order, or decision of the district courts, except in

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chancery, may be re-examined upon writ of error in the supreme court for error of law; therefore the legislature have by these provisions provided for all cases at law as to the manner in which they may be reviewed in this court, and in our view such regulations are in strict accordance with the organic act; but section 281 provides that a judgment or order in a civil action, except where made final by this act, may be reviewed as prescribed by this title, to wit, appeals in civil action, and it is declared in sections 284 and in 295 in what cases an appeal may be allowed. The organic act, as we have seen, however, has declared that appeals shall be allowed in all cases, which, as we have construed the law, means in all equity and admiralty cases; wherefore if we hold that the provisions of the practice act regulating the manner of allowing appeals, are only applicable to cases in equity and admiralty, there will be no conflict between the laws of the territory and the organic act.

And we may here remark that the legislature seems to have doubted their power to provide for the manner of taking appeals in actions at law, hence they also provided for writs of error in cases at law.

By this construction of the law our system of jurisprudence is perfect and complete, and the appellate jurisdiction of this court is made to conform with the ancient and well-established principles of judicial proceedings; the rules of practice then will be the same in substance as to appeals and writs of error, whether the cause be taken from the district to the supreme court of this territory, or from this court to the supreme court of the United States. We are therefore of opinion that as the case at bar is a common law action, it can be re-examined in this court only for errors of law upon a writ of error, as regulated by the civil practice act of this territory.

The appeal must therefore be dismissed.

Opinion of the Court—Noggle, C. J.

F. SHISSLER, APPELLANT, v. J. M. CROOKS,
RESPONDENT.

PRACTICE — APPEAL — NOTICE OF APPEAL — UNDERTAKING ON APPEAL. —

Three things are necessary in order to perfect an appeal, and to give the supreme court jurisdiction. 1. A notice of appeal must be filed as required by law. 2. A copy of the notice must be served on the adverse party or his attorney. 3. An undertaking must be filed within five days after filing notice of the appeal.

APPEAL from the first judicial district, Nez Perce county.

J. W. Huston, for the appellant.

A. E. Isham, for the respondent.

NOGGLE, C. J., delivered the opinion. LEWIS and WHITSON, JJ., concurred.

In this case a motion is made by the respondent to dismiss the appellant's appeal, for the reason that no undertaking was filed within the time fixed by section 296 of the civil practice act. Three things must be done by the appellant to perfect an appeal and give the supreme court jurisdiction: 1. A notice of appeal must be filed. 2. A copy of the notice so filed must be served on the adverse party or his attorney, as provided in section 285 of the civil practice act. And 3. The filing of the undertaking required by section 296 of said civil practice act. Such undertaking must be filed within five days after the date of filing the notice of appeal, and an undertaking filed after that time is filed too late. The mover in this case insists that the time within which the undertaking might legally be filed had long before elapsed; that the undertaking was in fact filed twenty-four days after the appellant filed his notice of appeal. In that he is sustained by the record returned to this court.

The record shows that an undertaking was filed on the ninth day of July, 1870, and the notice of appeal was filed on the fifteenth day of June, 1870. The undertaking not being filed within five days after filing the notice of appeal, for the purposes of an appeal in this case, there is no undertaking properly in the case, and this court has no jurisdiction. In all cases of appeal from the district to the

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supreme court, such an undertaking as is required by section 296 of the civil practice act, must be filed within five days after the date of filing the notice of appeal, and can not legally be filed before the notice of appeal is filed, or after the expiration of five days after that date.

Section 285 of the civil practice act says: "The appeal shall be made by filing with the clerk of the court with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party, or his attorney." This section must be construed in connection with the aforesaid section 296 of the same act, which declares that, "to render an appeal effectual for any purpose, in any case, a written undertaking shall be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all damages and costs which may be accrued against him on the appeal, in not less than three hundred dollars, or that sum shall be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal; such undertaking shall be filed or such deposit made with the clerk within five days after the notice of appeal is filed."

By this law the filing of an undertaking within the time specified for making the deposit is absolutely necessary to give effect to the appeal, neither of which was done in this case. The filing and serving the notice are the first steps necessary, which, with the filing of an undertaking according to law, perfects the appeal. The undertaking in this case not being filed within five days after the filing of the notice of appeal, there is no undertaking properly in the case, and the motion to dismiss the appeal should be granted. (*Hastings v. Halleck*, 10 Cal. 31; *Elliott v. Chapman*, 15 Id. 383; *Perian v. Munroe*, Id. 385; 1 Nev. 484; 2 Id. 344; 3 Estee's Cal. Practice, p. 716, sec. 209-238; *Shaw v. Randall*, 4 Cal. 215.)

The appeal in this case should be, and the same is hereby dismissed.

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THE PEOPLE, EX REL. J. H. McCARTY, RESPONDENTS,
v. G. W. HUNT, APPELLANT.

APPEAL—UNDERTAKING—PRACTICE.—If an undertaking on appeal is filed before the notice of appeal is filed and served, the appeal will be dismissed on motion.

APPEAL from the second judicial district, Ada county.
Motion to dismiss appeal.

Jos. Miller, for the appellant.

J. Brumback, for the respondents.

NOGGLE, C. J., delivered the opinion of the court, LEWIS and WHITSON, JJ., concurring.

A motion is made to dismiss the appeal in this case, by the respondent, because no undertaking has been filed since filing the notice of appeal. In the case of *Shissler v. Crooks*, *ante*, this court decided, at the present term, that three things are necessary to perfect an appeal, so as to give the supreme court jurisdiction: 1. The filing of a notice of appeal; 2. The service of a copy of such notice; and, 3. The filing of the undertaking required by section 296 of the civil practice act, which undertaking must be filed within five days after the filing of the notice of appeal. The undertaking must be filed after the filing of the notice of appeal, and within five days.

It is not legal to file the undertaking before the notice is filed. The record in this case shows that an undertaking was placed on file with the clerk of this court some two days before the notice of appeal was filed. No appeal was pending when the undertaking was filed, and since the notice of appeal was filed no undertaking has been filed, and for the purposes of an appeal in this case there is no undertaking on file.

In all civil cases appealed to this court, such an undertaking as is required by section 296 of the civil practice act must be filed after the notice of appeal is filed, and within five days, or the supreme court acquires no jurisdiction; and because no such undertaking has been filed since the

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time of filing the notice of appeal, the motion must be granted, and the appeal dismissed. (*Hastings v. Halleck*, 10 Cal. 31; *Elliott v. Chapman*, 15 Id. 383; *Shaw v. Randall*, Id. 384.)

For these reasons the appeal in this case is dismissed.

**JAMES I. CRUTCHER, APPELLANT, v. DANIEL CRAM,
TERRITORIAL CONTROLLER, RESPONDENT.**

CLAIMS AGAINST THE TERRITORY—LIMITATION.—Claims against the territory must be presented to the controller, with the evidence in support thereof, within two years after the same have accrued.

EVIDENCE IN SUPPORT OF CLAIMS.—The certificate of the prison commissioner to a claim against the territory, that the account is correct, and is due from the territory, is merely the evidence in support of such claim.

CONTROLLER.—It is the duty of the controller to carefully examine all claims against the territory presented to him for allowance, and if he is not satisfied that such claim is correct, or if it be not presented within two years from the time it accrued, he may reject it, notwithstanding the certificate of the prison commissioner stating that it is correct.

APPEAL from the second judicial district, Ada county.

McBride & Henley, for the appellant.

J. W. Huston, for the respondent.

Opinion by LEWIS, J. NOGGLE, C. J., and WHITSON, J., concurred.

The facts in this case, as shown by the record, are as follows: In March, 1868, the plaintiff was territorial prison-keeper, and, as such, had charge of the territorial prison, with the convicts therein confined. That several of said prisoners in his charge and custody escaped, and that in the pursuit and capture of three of them he expended the sum of one thousand dollars in the month of March, 1868. That on the twenty-second day of November, 1870, two years and eight months after said money had been expended, the plaintiff presented to the territorial treasurer, as *ex officio* prison commissioner, for allowance, his account, in the words and figures following, to wit:

“Idaho territory, to James I. Crutcher, territorial prison-

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keeper, Dr., to money expended in pursuing and arresting Hiram Kortz, Dunn, Bailey, escaped territorial convicts, during the month of March, 1868. One thousand dollars—\$1,000.”

This account is sworn to, and on the twenty-second day of November, 1870, the territorial prison commissioner made thereon the following indorsement, to wit:

“D. CRAM, Territorial Controller:

“Sir—I have examined the above account, and believe the same to be true and correct, and the territory is justly indebted to James I. Crutcher in the amount of one thousand dollars, for which you will issue your warrant upon the prison fund.

E. C. STERLING,

“Prison Commissioner.”

The controller refused to issue the warrant, and the question submitted to the court below was, whether a writ of mandamus be ordered to compel him to issue the warrant. It is insisted by the plaintiff that the controller is by law required to issue the warrant upon the certificate; that he is concluded and estopped by the certificate of the prison commissioner, and can not go behind it to ascertain whether the account be such as the law requires shall be paid, or whether it has been presented in time under the provisions of the statute.

It is provided by section 7, page 192, Laws of the Third Session, that all persons having claims against the territory shall exhibit the same, with the evidence in support thereof, to the controller, to be audited, settled, and allowed, within two years after such claims shall accrue, and not afterward. And by the provisions of section 9, page 162, Third Session Laws, it is made the duty of the territorial prison commissioner to examine and certify all accounts of the territorial prison-keeper to the controller, when satisfied they are legal. The law requires that the accounts be certified to the controller. Why provide for sending to the controller the accounts certified, if the controller is to have no discretion? Had the legislature intended to make the action of the commissioner conclusive, they would have pro-

Statement of Facts.

vided for the allowance of the accounts by the commissioner, and not have required the account to be certified up.

The laws above referred to were both passed at the third session, and are to be construed together, and a fair construction seems to be this:

That the certificate of the commissioner upon the account, is the evidence of the plaintiff in support of his claim. That this claim should have been presented to the controller, with such certificate, within two years after the claim accrued; that as it appeared on the face of the account that more than two years had elapsed after the claim had accrued, the controller was by law prohibited from allowing the claim. That in all cases it is the province and duty of the controller to allow no claims unless he is satisfied that they are correct, and presented within the time provided by law; and that notwithstanding the commissioner's certificate thereon, he may allow or reject the claim, as the law and facts may require.

The judgment of the district court is therefore affirmed.

THE PEOPLE, APPELLANTS, v. H. L. PRESTON AND
WELLS D. WALBRIDGE, RESPONDENTS.

REVENUE—TAXES—INJUNCTION.—The purpose of section 3 of the revenue act, making the taxes a lien on the property, and declaring that it shall not be removed until the taxes are paid, is to secure the payment of the taxes. If the payment of a judgment for taxes is secured by an undertaking on appeal, an injunction ought not to be granted to prevent the removal of the property.

APPEAL from the third judicial district, Owyhee county. Judgment was rendered against the Webfoot Mill for taxes; the defendants appealed, and executed a stay bond in double the amount of the judgment and costs. The defendants thereafter were about to take and carry away the mill, whereupon the plaintiffs brought action and prayed an injunction to restrain defendants from removing the same. The district court refused the injunction, and from that order the plaintiffs appealed

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L. P. Higbee, for the appellants:

Appeal and stay bond does not destroy or release the lien. (*Englund v. Lewis*, 25 Cal. 337; *Low v. Adams*, 6 Id. 277.) Mortgage liens are analagous to the tax lien, and courts of equity always protect mortgage liens, by injunction, against threatened waste or destruction of the mortgaged property. (1 Hilliard on Mortgages, 226-234; Willard's Eq. Jur. 369-381; Story's Eq., secs. 912-915.)

Rosborough & Preston, for the respondents.

Opinion by LEWIS, J. NOGGLE, C. J., and WHITSON, J., concurred.

The plaintiffs filed a bill in equity to restrain defendants from moving certain mill property from the territory, alleging that a judgment was rendered against the property, to wit, the Webfoot Mill, January 22, 1870, for the taxes for 1869, in the Owyhee district court. That no part of the judgment has been paid. That the judgment is a lien upon the property. That an appeal has been taken from the judgment to the supreme court of the territory. That execution has been stayed. The defendants filed no answer, and the court below made an order and decree dismissing the bill, on the grounds that there was no equity in the bill, from which order and decree the plaintiff appealed.

The sole question presented by the record is, whether there be any equity in the bill. Section 3 of the revenue act gives the plaintiff a lien upon the property assessed, and declares that the lien shall not be satisfied or removed until the taxes are paid; and so also, on judgment rendered, the lien continues (sec. 41). The bill discloses the facts that defendants are about to tear down and remove the mill beyond the limits of the territory, and that the lien will be lost, and that the judgment will be rendered worthless.

The object and purpose of the law in giving the lien is doubtless to secure the payment of the taxes. The plaintiff, however, insists that as the law gives the lien, this court should preserve and protect it. It is true, that the law

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technically gives such lien, that it is so provided; but when the object of the law is accomplished, and the reason ceases, the rule should not be applied. It is shown that the defendants have taken an appeal, and this the law declares they may do; that for the purpose of securing the payment of the judgment, a bond has been filed in double the amount of the judgment, with ample sureties, which the law declares shall stay the proceedings, and such bond stands in the place of a deposit of a sum of money equal to the amount of the judgment.

Where a party has a remedy at law, he can not come into a court of equity. (Hilliard on Injunctions, page 15.) It is also said that an application to a court of chancery for the exercise of its prohibiting powers, must come recommended by the dictates of conscience, and sanctioned by the clearest principles of justice; that the process of injunction should be applied with the utmost caution. (Hilliard on Injunctions, sec. 18.) Does the case at bar come within the purview of the above rule? Is it in accordance with the principles of equity and good conscience that when, as disclosed by the bill, the plaintiff has full, perfect, and ample security for the payment of the taxes, the writ should be issued? We think such is not the purpose of the law, and most clearly it is not in accordance with the principles of equity.

Wherefore, inasmuch as there is no equity in the bill, the judgment and order of the district court is affirmed.

EMMA E. COX, RESPONDENT, v. THE NORTH-WESTERN STAGE CO., APPELLANT.

WRITTEN INSTRUMENTS—"DUE EXECUTION."—The due execution of an instrument in writing goes to the manner and the form of its execution, by a person competent to execute it according to the laws and customs of the country where executed.

IDEM—"GENUINENESS" OF AN INSTRUMENT.—The genuineness of an instrument in writing goes to the question of its having been the act of the party, just as represented; or, in other words, that the signature is not spurious, and that nothing has been added to or taken from it, which would lay the party signing or changing the instrument liable for forgery.

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PRACTICE.—A failure by plaintiff to deny, by affidavit, the genuineness and due execution of an instrument in writing set forth in the answer as the foundation of the defense, does not preclude the plaintiff from showing, on the trial, that it was procured by fraud or misrepresentation.

CONTINUANCE—POSTPONEMENT—DISCRETION.—Postponing a trial rests in the sound discretion of the court; and this court will not review that discretion, unless there appears to have been a very gross abuse in its exercise.

WEIGHT OF EVIDENCE—VERDICT.—When there is some evidence to sustain each of the material questions upon which a jury is bound to find in order to support a verdict, this court ought not to disturb the verdict, even if the court would have found differently on any or all of the issues.

FRAUD—WEIGHT OF EVIDENCE.—If there is some evidence tending to show fraud, the question, whether or not there actually was fraud, is to be submitted to the jury.

SEALED INSTRUMENT.—An instrument under seal, not required by law to be sealed to give it effect, gives it no more solemnity, or makes it no more binding upon the party sought to be charged thereby, than if not under seal.

JURY—PRESUMPTION.—A jury is presumed to have found its verdict upon the facts without having been influenced by passion or prejudice, and where a verdict is for a less sum than the full amount demanded in the prayer of the complaint, this presumption is strengthened. That a jury has been influenced by passion or prejudice must be made to appear affirmatively.

APPEAL from the second judicial district, Ada county.

H. L. Preston, Jos. W. Huston, and H. E. Prickett, for the appellants.

E. J. Curtis and McBride & Henly, for the respondent.

WHITSON, J., delivered the opinion; LEWIS, J., concurring. NOGGLE, C. J., dissented.

On the thirty-first day of October, 1870, Emma E. Cox commenced in the district court of Ada county an action against the North-western Stage Co., of which Fuller, Parker & Co. were proprietors, alleging in her complaint that on the twenty-sixth of September, 1870, the said company were common carriers of passengers for hire by stage-coach, between Silver City in the county of Owyhee and Boise City in the county of Ada; that on said day the defendants received her upon their stage-coach to be carried from Babbington's station in Owyhee county, to Bernard's station in Ada county, on the line of said stage route; that

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while she was such passenger between said stations the coach upon which she was being carried was by the carelessness and negligence of the defendants overturned and thrown down, by means whereof she was greatly bruised, wounded, and permanently injured in body, and had so continued from the day of the accident up to the commencement of the action, whereby she was damaged generally in the sum of twenty thousand dollars, and specially in the sum of six hundred dollars, for which she asked judgment. On the seventh of November, 1870, the district court convened, and on the eighteenth of November, the defendants filed their answer denying every material allegation in the complaint, except that they were common carriers; and also set up as a bar to the action, that on the twenty-sixth of September, the plaintiff executed an instrument of writing under her hand and seal, whereby she had released the company from any and all liability on account of any injury she had received by reason of the accident; which instrument was set up by copy in the answer. On the nineteenth of November, defendants moved for judgment on the pleadings, for the reason that the plaintiff had filed no affidavit denying the due execution and genuineness of the instrument of writing which had been set up by copy in the answer. The court overruled the motion and defendants excepted. On the same day defendants moved for a continuance, on the affidavit of E. S. Hubbell, which was resisted upon the counter affidavit of plaintiff. The court overruled the motion and defendants excepted.

On the twenty-first of November, the cause went to trial, and continued until the twenty-third, when the court charged the jury, who, on the same day, returned a verdict for plaintiff for fifteen thousand dollars general, and two hundred and eighty dollars especial damages. Defendants moved for a new trial. The motion was heard and determined adversely to the motion, on the twenty-fourth of December, to which defendants excepted.

The defendants appeal to this court, and the questions presented for our consideration are: 1. Did the court err in refusing to give the defendants judgment on the plead-

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ings? 2. Did the court err in refusing to postpone the trial? 3. Did the court err in charging the jury upon matters of law? 4. Did the jury give damages not supported by the evidence as applied to the law given by the court?

The discussion of the first proposition involves a question of practice under the statute only. Sections 53, 54, and 65 of the civil practice act provide as follows:

Sec. 53. "When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the answer denying the same be verified.

Sec. 54. "Where the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the plaintiff file with the clerk, five days before the commencement of the term, at which the action is to be tried, an affidavit denying the same; provided, that the due execution of the instrument shall not be deemed to be admitted by a failure to controvert the same on oath, as prescribed in this and the last preceding section, unless the party controverting the same is, upon demand, permitted to inspect the original before filing such answer.

Sec. 65. "Every material allegation of the complaint, not specially controverted by the answer, shall, for the purposes of the action, be taken as true; the allegation of new matter in the answer shall, on trial, be deemed controverted by the adverse party."

It is claimed by the defendants that the plaintiffs, in not denying under oath the genuineness and due execution of the release set up by them in their answer, should be deemed to have admitted its genuineness and due execution. While we do not think that section 65 denies for the plaintiff the genuineness and due execution of the written instrument set up as a bar by the defendants, there can be no doubt but that such section does controvert for the plaintiff every other fact alleged by the defendants and set up as new matter by way of defense. There can be no doubt but that

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section 54 was intended to vary the general rule provided for in section 65, and the question arises, what did the plaintiff admit by not filing an affidavit?

Evidently she admitted nothing, except that release was genuine and duly executed; for section 65 has controverted for her every other allegation of new matter in the answer, which is alleged affirmatively therein, or which follows as a deduction therefrom.

Defendants say to plaintiff, in their answer, substantially: "You have given us a release of all demands you ever had against us, and you have done this under your hand and seal, and the law presumes that such instrument was genuine, and duly executed, and, as a necessary deduction, that you intended everything which could be claimed under the release."

Plaintiff says to defendants, in her reply, which the law puts in for her: "I admit that such release was duly executed by me, and that it is genuine; but I deny that I intended what the terms of the writing imply, and contend that it was obtained by fraud and misrepresentation." Could plaintiff truthfully say more? Could plaintiff have denied the due execution and genuineness of that instrument without committing perjury, and yet it be true, as a matter of fact, that she was in every way competent to, and, in fact, did execute the very instrument alleged in the answer, in the manner and form as set up therein? We think not. The due execution of an instrument goes to the manner and form of its execution according to the laws and customs of the county, by a person competent to execute it. The genuineness of an instrument evidently goes to the question of its having been the act of the party just as represented, or, in other words, that the signature is not spurious; and that nothing has been added to it, or taken away from it, which would lay the party changing the instrument, or signing the name of the person, liable for forgery.

If Fuller, Parker & Co. should, through their authorized agent, go to A., a stock-raiser in this valley, and should execute a note for two hundred dollars to him, as the consideration for a fine stage horse of which he represented himself, and

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of which they believed him to be the owner, but which in fact belonged to B., would any lawyer say that because the consideration had failed, that therefore the note was not duly executed and genuine? Where a written instrument is set up in a complaint as the foundation of an action, and its genuineness and due execution are not denied by a verified answer, the same rule applies in relation to what is deemed to be admitted, as in the case where the answer sets up a written defense, and no affidavit, denying its genuineness and due execution, is filed. Take as an illustration the case of the company in the purchase of the horse of A., and let us further suppose that A. should bring an action to recover the two hundred dollars upon the note given A. for B.'s horse, and a copy of the note should be set out in the complaint, what would the company be admitting by setting up the misrepresentation and fraud on the part of A., if they failed to deny the genuineness and due execution of the note? Could it be contended that setting up those facts of fraud and deceit was denying the genuineness and due execution of the note? Clearly not. We think that the law in the case at bar, set up for plaintiff every defense against this release that the company set up in their answer in our supposed case, unless it should be contended that their defense of fraud and misrepresentation was a denial of the genuineness and due execution of the instrument, which we do not think could be maintained, even if their answer was verified.

We think this view of the case is amply sustained by the following authorities under similar statutes and rules of practice to ours: *Smith v. Milburn*, 17 Iowa, 30, and 13 How. 103; *Corcoran v. Dall*, 32 Cal. 83; *Bryan v. Manne*, 28 Id. 238; *Herold v. Smith*, 84 Id. 122.

The second proposition is, "Did the court err in refusing to postpone the trial?" The question of postponing trials has always been held by the courts to be in the sound discretion of the court which had a knowledge of all the facts and circumstances in the case, and it has never been the policy of appellate courts to control the discretion of the lower courts, unless there was a very gross abuse of discre-

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tion. Section 158 of the civil practice act is the only provision which provides for a postponement, and that section only provides when a postponement shall not be granted, and we can only infer that by implication in certain cases a continuance should be granted, in the sound discretion of the court. It has been held in California, under a similar statute to ours, that even in a criminal case, where a counter affidavit was filed tending to show that the application was not made in good faith, the court did not abuse its discretion in refusing a continuance. (*The People v. De Lacey*, 28 Cal. 589.) In this case the application is based upon the affidavit of E. S. Hubbell, who is an agent of the company, and who swears the company expects to prove certain things by one D. R. Johnson, who had been duly served with subpoena as a witness for the company. Hubbell swears that the company expect to prove by Johnson that the drivers were forbidden to receive any passenger on the coaches of the company who had not been regularly entered upon the way-bills; that he had settled this matter in controversy with Miss Cox, who fully understood the terms of the settlement; that plaintiff had, before and after the settlement, admitted that she was on the stage without the consent of the company; that there was no negligence on the part of the driver, and that the overturning of the stage was purely accidental; that the agents or attorneys of the company did not know that Johnson was going away until late in the evening before his departure on the following morning. It appears that the drivers had orders to not receive any passenger on the coach who had not been regularly registered on the way-bill, and yet there was no one by whom this fact could be proved. But even if such were the orders, it does not appear from the affidavit that Miss Cox was admonished of this fact, and therefore it was immaterial as to whether such orders were given drivers or not.

Miss Cox flatly contradicts every other thing which Hubbell says Johnson would swear to, and the affidavit stated that all these matters were either admissions of hers, or transactions with which she was connected, and of which

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she must have necessarily had a personal knowledge. We think that her affidavit had a very strong tendency to show that the affidavit of defendant's agent was not made in good faith.

3. The question as to how far the court erred in charging the jury is in this case purely a law question, as it does not appear from the charge of the court that any attempt was made to state the facts, or to assume that anything had been proved. The court charged the jury upon the question of fraud and negligence, and we think the charge sound upon these subjects, as well as upon all the essential questions of law raised in the case.

4. As the charge of the court is so intimately connected with the facts, as found by the jury, we come now to consider as to whether or not the jury was justified in finding what they did under the facts, as applied to the law given to them by the court.

We must presume that the jury found four things: 1. That the plaintiff was very severely injured by the overturning of defendant's stage-coach; 2. That such accident was the result of carelessness on the part of the company's driver; 3. That the release was obtained by fraud; and 4. That she was damaged in the sum of fifteen thousand two hundred and eighty dollars. These four things were all essential in order to enable plaintiff to recover, and the only question for us to determine is, was there some evidence on each of these points to support the verdict? The question is not whether this court would have found as the jury did, but whether or not there was such an abuse of discretion on the part of the jury as to demand an interference by this court. No one will contend but what the jury had a right to pass upon all of these questions.

1. As to the first fact found by them, we do think that there was not only some evidence to support the finding, but considerable.

2. As to the second fact found, the rule is, that if there is evidence tending to show fraud, the question as to whether or not there actually was fraud, is to be submitted to the jury. It is not necessary for us to go further than to deter-

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mine whether or not there was such a tendency in the facts surrounding the execution of this release. The testimony is that the plaintiff did not read the instrument, but that she relied on the statement of those who told her that it was a paper which Mr. Johnson wanted her to sign, to show the company that he had paid the doctor's bill, and made everything all right. All the witnesses use the same phrase. Why put in doctor's bill if "made everything all right" was intended to cover every other claim that plaintiff had against the company? Why not have said that the paper was "wanted by Mr. Johnson to show the company that everything was all right?" Why not have said that "this paper is to show the company that the plaintiff had relinquished all right of action against it?"

The doctor's bill may have been made very prominent in order to detract the attention from the importance of what followed. We doubt whether or not the most acute observer would ever have mistrusted that "made everything all right," when used in connection with "paid the doctor's bill," meant anything more than that everything had been made all right in relation to the doctor's bill. While this court may not have found that there was sufficient fraud to set aside the release, we do think that there was enough evidence on that subject to submit to the jury that question, and that the court properly submitted the actual fact of fraud to them.

The fact that the release was under seal imports no more dignity than if it had been otherwise, because it was not an instrument which is required to be under seal.

A plain receipt reading,

"Received, September 26, 1870, of Fuller, Parker & Co., one hundred dollars, in full of all demands, of whatsoever nature, against them held by me.

"Signed,

EMMA E. COX,"

would have been as binding on her in such a case as the most solemn and dignified release that could be prepared. One would be of no more avail than the other under the same state of facts.

3. The jury evidently believed that there was negligence

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on the part of the company, or in other words, that the accident might have been avoided. There is nothing which goes to show that the jury found their verdict upon the belief that there was gross negligence, and even if the rule is different in cases of gross or mere negligence, in this case the questions would be entirely immaterial, as it is not alleged in the complaint that there was gross negligence, nor does it appear from anything that the jury intended to give plaintiff any more than compensatory damages. It is equally true that if the jury were only intending compensatory damages, it is immaterial whether the stage was driven by the proprietors or their servant.

4. The jury found that the plaintiff had been damaged generally fifteen thousand dollars, and specially two hundred and eighty dollars, and for that reason alone we are asked to find three facts: 1. That the jury were giving exemplary damages; 2. That they were influenced by passion or prejudice; and 3. That the amount of damages was disproportionate to the injury sustained. As to the first point, we are at a loss to know how we are to infer that because the jury found a particular sum under a correct charge as to the law, and the facts of which they were the exclusive judges, therefore they gave more than compensatory damages. The jury have not told us that they intended exemplary damages, and to presume it would be to presume against the long-established rule that a jury are presumed to find according to the law and facts.

As to the second point, we do not see by what rule we are to say that the jury were influenced by passion or prejudice. Does not the fact that they might have found a verdict for five thousand dollars more than they did, completely answer any presumption of that kind? There is nothing which goes to establish such a state of facts. Nothing appears from which we can infer any such fact, except the mere assertion of defendants. As to the third point, that the damages given are disproportionate to the injury sustained, we can not conceive how or by what rule we are to determine that question. Twelve men have said, upon a matter of fact of which they are presumed to be as good judges as

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we, that this plaintiff has in all probability been injured for life, and that she ought to have fifteen thousand dollars. Upon what rule of computation can we say that she ought not to have so much? Who can place a value in dollars and cents upon an eye, an arm, or a leg? With what measure can human suffering and loss of bodily strength be computed?

Is there any probability that twelve lawyers, after having perused all the law-books from Blackstone down, could write on separate slips of paper twelve amounts, any two of which would agree? The presumption is in favor of an impartial and considerate action on the part of a jury, and we must be convinced affirmatively before we could, by any rule of law, be permitted to question such presumption. A jury of twelve good and lawful men have said by their verdict, that this plaintiff has been damaged in the sum of fifteen thousand two hundred and eighty dollars, and we do not think that, under the law and facts, we would be justified in saying that they were not correct, as well as honest, in their judgment.

The judgment of the court below is affirmed.

**THE PEOPLE, RESPONDENTS, v. PETER F. WALTER,
APPELLANT.**

CONTINUANCE—DISCRETION.—An application for a continuance is addressed to the sound discretion of the court; and courts of review will refuse to disturb a ruling on such question, unless it appears that such discretion was abused, and the ruling arbitrary.

INSTRUCTIONS—BILL OF EXCEPTIONS.—The proper mode of bringing before the appellate court, for review, the instructions given by the court on its own motion, is, by embodying them in a bill of exceptions.

INSANITY—BURDEN OF PROOF.—If the defendant relies upon insanity to procure an acquittal, he assumes the burden of proof as to that matter. He makes insanity an affirmative issue on his part; hence, to establish a defense on the ground of insanity, the defendant must, by a preponderance of evidence, show to the jury, that at the time of the commission of the act, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing wrong, in respect to the act with which he is charged.

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HOMICIDE—MURDER.—Every homicide, unexplained, is murder; but it is the province of the jury to determine, from the evidence and circumstances before them, whether the crime be murder in the first or second degree.

IDEM.—If the defendant admitted the killing, in this case, he admitted that he was guilty of murder, if he was not insane; and it should have been submitted to the jury, under proper instructions, to say, from the evidence, whether the crime was murder in the first or second degree.

APPEAL from the first judicial district, Nez Perce county.

LEWIS, J., delivered the opinion. WHITSON, J., concurred. NOGGLE, C. J., dissented.

On the sixth day of October, 1870, the grand jury of Nez Perce county, presented a true bill of indictment against the defendant, charging that the defendant on the fifteenth day of September, 1870, at Nez Perce county, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, did make an assault, etc., upon one, Joseph Yotes, and him, the said Joseph Yotes, did feloniously, willfully, deliberately, premeditatedly and of his malice aforethought, did kill and murder. On the seventh of October the defendant was arraigned, and on the tenth pleaded "not guilty." The cause was set for trial on the thirteenth of October, at ten o'clock. On the thirteenth of October the defendant filed motion for a change of venue, which was overruled, to which defendant excepted. Defendant also filed his motion for continuance, which was denied, defendant excepting. The case was thereupon tried before the court and a jury, and after argument of counsel "the court," charged the jury as to the law, the counsel for the defendant excepting thereto.

Whereupon the jury, after consideration, returned a notice as follows:

"The People of the United States in the Territory of Idaho v. Peter F. Waller.

"Indictment for murder in the first degree.

"We, the jury, find the defendant guilty of murder in the first degree, as charged in the indictment.

"LEVI ANKNEY, Foreman."

On the nineteenth of October, sentence and judgment of

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the court was pronounced, that defendant be executed on the ninth day of December, 1870. Upon the fourteenth of November, 1870, defendant gave notice of appeal from the judgment and sentence of the court.

Sundry errors have been assigned by defendant, to wit:

1. The court erred in refusing to grant a continuance. 2. The court erred in denying defendant's motion for a change of venue. 3. The court erred in refusing to admit certain testimony. 4. The court erred in charging the jury that the court was relieved from the necessity of defining the degrees of murder, etc. 5. The court erred in charging the jury as to the law of evidence of insanity. 6. The court erred in charging the jury that defendant was guilty of murder in the first degree or he is not guilty.

The first error assigned is that the court erred in refusing to sustain the motion for a continuance. An application for continuance is one addressed to the discretion of the court, and courts of review have uniformly refused to disturb a ruling on such questions unless it be shown that the discretion was abused and the ruling arbitrary. (*Herron v. Jury*, 1 Idaho, 190.) It is not apparent from the record that such discretion was abused, and the court committed no error in denying such motion. As to motion to change venue and ruling on the evidence brought here upon bill of exceptions, there was no error which could work to defendant's injury.

An important question as to practice has been raised in the argument of the case, and presented for our determination.

The instructions of the court are not signed by the judge. The certificate of the clerk is attached identifying the instructions copied in the transcript as a full and correct copy of the original instructions and charge of the court on file.

The minutes of the trial show that the defendant excepted to the instructions given by the court to the jury. On this condition of the record are the instructions properly before us. It is provided by section 420, Crim Prac.,

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that defendant may except to a decision of the court in instructing the jury as to the law of the case.

Sec. 422. A bill containing the exceptions must be signed by the judge and filed by the clerk. Sec. 425. When any written charge has been presented and given or refused, the questions presented in such charge need not be excepted to, or embodied in a bill of exceptions, but the charge with the action of the court thereon indorsed shall form a part of the record. Section 449 declares what shall constitute the record; the sixth is the bill of exceptions; and seventh, the written charges asked of the court. A majority of the court are of opinion that the proper mode to bring before this court for review the instructions of the court given on its own motion, is by embodying them in a bill of exceptions; but this case involves the life of an individual, and the rule of practice has not been established. I do not think it justifiable to enforce this rule for the first time in the case at bar.

Therefore, for the purpose of this case, as the instructions of the court below are before us in the transcript, I think we should examine them as a part of the record of the case.

The instructions given by the court upon its own motion, so far as material to the consideration of the errors assigned, are as follows:

“ Murder is the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned. Express malice is that deliberate intention, unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart. Malice, in its legal sense, is a wrongful act done intentionally without just cause or excuse. Ordinarily provocation is set up as a defense; or justification is in some way claimed in behalf of the defendants; and in such cases, where any such defense is interposed, it becomes necessary

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for the court to give the law to the jury defining the different degrees of murder and manslaughter; this case, however, is a different one. The court is relieved from that duty, because the defendant and his counsel in this case admit the killing without legal cause or provocation, as charged, but insist that they have proved insanity, etc., at the time.

“In entering upon the investigation of this defense, however, the jury should remember that the defendant, having admitted the killing as charged, and setting up insanity, the burden of proving this defense to the satisfaction of the jury is upon the defendant; because the law presumes that every man is sane, and possesses a sufficient degree of reason to be responsible for his crime. Until the contrary be proved to the satisfaction of the jury, and that to establish a defense on the ground of insanity, it must be clearly proved, that at the time of the committing of the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong, in respect to the very act with which he is charged.

“In this case you have a case submitted to you which, for the purpose of this trial, the charges in the indictment against the defendant, upon the trial, and in the argument counsel for defendant, are admitted to have taken place as charged. The defendant not controverting the proof, insists, however, that at the time the defendant did the act charged he was insane, and not responsible for what he did; they offer no proof to the contrary. This is really the only question submitted to the jury, the question of insanity, and that to establish a defense on the grounds of insanity it must be clearly proved by a preponderance of the evidence given upon the trial, etc.

“If the jury find the insanity established, and the defendant not guilty, you will simply say: ‘We, the jury, find that the defendant is not guilty.’

“If the jury find the defendant guilty, the jury will simply say: ‘We, the jury, find the defendant guilty of the

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offense as charged in the indictment.' The jury will also find the degree of murder, and they will say by their verdict whether the defendant is guilty of murder in the first or any other degree.

"The defendant in this case is either guilty of murder in the first degree or he is not guilty as charged."

The foregoing recited instructions are all that are material to an understanding of the case. The instructions given to the jury as to the question of insanity are in accordance with the rule as laid down in Ohio. (*Loeffner v. The State*, 10 Ohio State, 598; *Clark v. The State*, 12 Id. 483.) The same rule is declared in California. (*People v. Coffman*, 24 Cal. 230; *People v. Meyers*, 20 Id. 518.) So also in Mississippi. (*Kelly v. The State*, 30 Smed. & M. 518.) In New Jersey it is held that the burden of proof is on defendant, and that to excuse the crime the jury ought to be satisfied of the insanity beyond a reasonable doubt. (*State v. Spencer*, 1 Zab. 197.) But this last case goes too far; a different rule prevails in Illinois (*Mopps v. The People*, 31 Ill. 385), where it is held, that to convict, the jury must be satisfied of the sanity of defendant, beyond a reasonable doubt, and this is the ablest case we have seen on that rule. The rule in New York is the same as in Illinois. (*People v. McCann*, 16 N. Y. 58.) So also in Michigan. (*People v. Gortrue*, 17 Mich. 9.)

Looking at the well-established principles of law and evidence, that the prisoner is presumed to be innocent, that he is presumed sane, from the fact that he is a man of whom rationality is an essential attribute; that to sustain the prosecution the homicide is proved, and when the facts which are necessary to constitute the crime are sufficiently proved to warrant a conviction in the absence of other proof, the prosecution may safely rest; a case is then made out against the accused; and if to procure an acquittal he relies upon insanity, he assumes the burden of proof as to that matter; he makes insanity an affirmative issue upon his part, because it is an allegation of fact, in opposition to a presumption of law. The prosecution does not, in a criminal case, by affirming the guilt of the accused, undertake to prove

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his sanity, for the reason that it is not necessary to prove what the law presumes.

We are of opinion that the rule as laid down by the court below, sustained as it is by both reason and authority, is the better one; hence, the court did not err, in so charging the jury as to the question of insanity.

Looking at the whole of the instructions, as to the other points raised, we think that they are in substance this:

1. That in ordinary cases it is the duty of the court to instruct the jury as to the different degrees of murder.

2. That in this case it is not necessary so to do, because the defendant admits the killing without cause or provocation as charged, but insists upon his insanity, and that in reality the only question submitted to the jury is that of insanity.

3. That the defendant in this case is either guilty of murder in the first degree, or he is not guilty as charged.

The court did not define to the jury the law as to what constitutes murder in the first degree, and what constitutes murder of the second degree as contradistinguished from murder in the first degree; but said to them that if they found him guilty as charged, they would say whether he was guilty of murder in the first or any other degree. The jury were only instructed in general terms as to the crime of murder, and therefore could not consider as to the different degrees. The court in substance said to them: Gentlemen, the defendant admits the killing as charged, and insists upon insanity as a defense. You must find the defendant insane, or that he is guilty of murder in the first degree. If the defendant had in open court pleaded guilty of the offense charged in the indictment, it would have been the duty of the court to have proceeded, by examination of witnesses, to determine the degree of the crime. (Crim. Act, sec. 17.) Now the defendant most certainly, on plea of insanity and admitting the killing, ought not to be put in a worse condition than if he had pleaded guilty in open court. If the killing were proved it would not raise the presumption that it was done deliberately, willfully, and premeditatedly, and of malice aforethought; in other words,

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it would not raise the presumption that defendant is guilty of murder in the first degree. (*State v. Turner*, Wright, 20; *People v. White*, 24 Mead, 580; *Johnson v. Coen*, 241 a, State, 386; *State v. McCormick*, 27 Iowa, 402.) The same point has been so held in California. (*People v. Gibson*, 17 Cal. 283.) In that case Justice Baldwin says:

When a homicide is committed, it rests upon the accused to show justification, excuse, or mitigation, and this not being shown, the legal inference is that he has committed the crime of murder. This crime consists in the perpetration of an unlawful act, and the malicious intent. But these characteristics as well apply to murder in the second, as to murder in the first degree. The act of killing unexplained is murder; but the fact of killing does not necessarily show that it was done with such premeditation willfulness, and deliberation as to constitute murder in the first degree, or that it was done in the prosecution of a felony. While, therefore, every homicide unexplained is murder, it must be left to the jury to determine from the circumstances before them, whether the crime is murder in the first or second degree.

This exposition of the law is, in our view, eminently sound, and has ample authority to sustain it. (See also *People v. Foren*, 25 Cal. 361.) The offense charged in the indictment is murder. It is not necessary to say by the indictment whether it be murder in the first or second degree. It is in fact, not the province of the grand jury to determine as to the degree of the crime. The offense is so stated in the indictment in the case at bar that the jury might find murder in the first or second degree, and in fact the statute expressly requires the jury to find the degree.

The defendant then in this case was charged with the crime of murder; and in fact the indictment positively states that defendant is accused of the crime of murder. And hence the court erred in instructing the jury that the defendant was either guilty of murder in the first degree or he was not guilty as charged.

That the jury understood that in accordance with the instructions, defendant was charged with murder in the first

 Points decided.

degree, seems clearly shown by the form of this verdict herein above set out. The case is thus stated:

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Indictment for murder in the first degree.

When, therefore, the defendant in this case admitted the killing, he only admitted that he was guilty of murder (if not insane), and it should have been submitted to the jury under proper instructions to say from the evidence whether defendant was guilty of murder in the first degree or in the second degree. This is a right to which he was entitled by law; it is a substantial right in which is involved his life, hence, for errors occurring as above indicated, the judgment of the district court is reversed, the cause remanded, and a new trial ordered.

THE PEOPLE, EX REL. J. W. HUSTON, v. L. B.
LINDSAY AND WILLIAM BRYON.

CERTIORARI.—Three things are necessary to be shown to warrant the granting of a writ of certiorari to the district judge: 1. That the judge exceeded his jurisdiction. 2. That there is no appeal. 3. That there is no other plain, speedy, and adequate remedy.

IDEM—DISMISSING WRIT.—A writ of certiorari improperly granted, will be dismissed on motion.

DISTRICT COURT—JUDGE AT CHAMBERS—JURISDICTION—QUO WARRANTO.—

The district court has jurisdiction on *quo warranto* to determine the rights of several parties who claim to be entitled to the office of sheriff; and the judge of that court may properly decide, in such case, whether it is necessary to allege in the complaint that there has been an actual usurpation of the office; and if there be error in the ruling, such error may be corrected on appeal.

APPEAL—JUDGE AT CHAMBERS.—An appeal lies from the judgment of a district judge at chambers.

JUDGE AT CHAMBERS—JURISDICTION.—A judge of a district court does not exceed his jurisdiction by issuing an order or writ to enforce a judgment rendered by him at chambers.

CERTIORARI.—Certiorari will not lie until the case has been finally disposed of in the inferior court.

CERTIORARI to the judge of the district court of Ada county.

H. E. Prickett, for the defendant.

Arguments of Counsel.

William Bryon moved to quash and dismiss the writ:

This is a proceeding by writ of certiorari, to review the proceedings and judgment of the judge of the district court, at chambers. The jurisdiction of a judge at chambers is sustained, at common law, by the following authorities: *Doe v. Mullarky*, 39 Eng. Com. L. 333; *Buller v. Stoveheld*, 8 Id. 552; *Slack v. Clifton*, 55 Id. 523; *King v. York*, 28 Id. 195; *Tomlinson v. Ballard*, 45 Id. 642; *Thompson v. Breck*, Id. 757; *De Forest v. Wall*, 58 Id. 598; *Low v. Ridley*, 59 Id. 478; *Padwick v. Turner*, 63 Id. 124.

We refer to the following decisions as sustaining the jurisdiction, when conferred by statute: *United States v. Nourse*, 6 Pet. 470 (1 Wisc. 623-625); *People v. Wilcox*, 22 Barb. 194, 195; *Brach v. Beckwith*, 13 Wisc. 21. This cause was tried at chambers by stipulation: *Held*, that the court had jurisdiction of the subject-matter and parties, and that the judge might so try it. (*Walker v. Rogan*, 1 Wis. 597.) This is a well-considered case, full of pith, point, and law, completely covering the whole question. (See also *Brewster v. Hartley*, 37 Cal. 15.) The case has not been finally determined by the judge of the court below. It is now pending on a motion for a new trial. Certiorari will not lie to an inferior tribunal, until the subject-matter has been finally adjudged. If the district judge has erred in judgment, the case can be brought to this court for review, after a final judgment has been rendered, by appeal or writ of error; therefore certiorari will not lie.

J. Brumback, for defendant Lindsay, opposing the motion:

We have three things to establish: 1. That the district judge has exceeded its jurisdiction. 2. That there is no appeal. 3. That there is no other plain, speedy, and adequate remedy. The district court has no jurisdiction of the subject-matter, because an action of this kind will not lie except where there is a user of the office. (*Saunders v. Haynes*, 13 Cal. 148, 149; *Angell & Ames on Corp.*, secs. 764, 765; *Wheat. Sel.* 1163-1190; 6 Abb. Pr. 220. The very words *quo warranto* imply possession—a user.

The proceeding attempted in this case is special, there-

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fore the jurisdiction can only be exercised by the tribunal upon which it is conferred by statute. (*Reed v. Omnibus R. R. Co.*, 33 Cal. 212.) The judge at chambers had no jurisdiction to try the case. He can do nothing at chambers that he is not expressly authorized to do. (*Smith v. Chichester*, 1 Cal. 409; *Weeks v. Ludwig*, 9 Id. 175; *Hegeler v. Henschkell*, 27 Id. 495; *Bond v. Pacheco*, 30 Id. 532; *Norwood v. Kenfield*, 34 Id. 330; *Reynolds v. Bassett*, 1 Kansas, 86.) The organic act confines the judicial power to courts. (Sec. 9.) No judicial business, therefore, can be done out of court. The statutes only provide for an appeal from the judgments of a court; therefore, there is no appeal in this case. The right of appeal is statutory. (*Frerry v. Dodge*, 9 Minn. 166.) When a court attempts to exercise powers beyond its jurisdiction, its proceedings are *coram non judice*, and are not reviewable by appeal. (*Weeks v. Ludwig*, 9 Cal. 175; *People v. Jones*, 20 Id. 55; *Stone v. Elkins*, 24 Id. 125; *People v. The Judges*, 24 Wend. 251.) Lastly, there is no other plain, speedy, and adequate remedy.

LEWIS, J., delivered the opinion. WHITSON, J., concurred, and NOGGLE, C. J., dissented.

The plaintiff, upon the information of the district attorney, commenced an action in the court below against defendants, alleging that both defendants claimed to be entitled to the office of sheriff of Ada county, for the term of two years from the second day of January, 1871, and asking that the respective rights of defendants be determined. At the November term of said court for 1870, each of the defendants filed separate answers admitting that they made such claim, and setting up the facts upon which they based their claims. The cause being at issue at the November term of said court, upon the complaint and separate answers of the defendants, and set down for trial, by an agreement of the parties the following order was made of record on the twenty-first of November, 1870, being the thirteenth day of the term:

“Now, on this day, the attorneys for the several parties file their stipulation that said cause be continued beyond

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the term, and that the same be tried before the judge of this court, at chambers, upon five days' notice to the several parties; whereupon the court ordered that said cause be continued, as asked by counsel in said stipulation filed."

On the fourteenth of December, Bryon served notice upon the other parties, that he would bring the case to trial on the twentieth of December, 1870, at ten o'clock A. M., before the judge at chambers. On the twentieth the case was called for trial at chambers, all of the parties being present by counsel, whereupon defendant Lindsay filed his motion to dismiss, because the complaint did not set forth facts sufficient to constitute a cause of action. This motion was overruled, to which Lindsay excepted. The judge thereupon proceeded to hear and determine the case.—J. W. Huston, attorney for the people; Prickett & McBride, for Bryon; Roseborough, Brumback, Heed & Miller, for Lindsay.

After hearing the evidence and arguments of counsel, judgment was rendered that Bryon was entitled to such office, on the facts found for two years, from the second of January, 1871, and that Lindsay was not; and adjudging the right to said office to Bryon, precluding Lindsay therefrom. On the thirtieth of December, Lindsay filed his notice of motion for a new trial. On the third of January, 1871, Bryon filed his affidavit stating that notwithstanding the judgment, the defendant, Lindsay, on the third day of January, entered and took possession of said office, jail, etc., and prevents him from taking possession in accordance with said judgment. An order was then issued by the judge, to Orlando Robbins as elisor, commanding him to put Bryon in possession, which he did.

On the fourth of January, 1871, Lindsay filed his motion and statement for a new trial, before the court below, which was noticed for hearing on the seventh of January, at ten o'clock, and before said judge. The points raised upon said motion being: 1. Insufficiency of the evidence to justify the findings and decision; 2. Error of law occurring at the trial duly excepted to; 3. Newly discovered evidence.

This being the condition of the cause, upon the seventh

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of January, 1871, defendant, Lindsay, made application to this court for a writ of certiorari, which was issued, and the record being now before this court.

The defendant, Bryon, files herein his motion to quash the writ of certiorari herein issued because it appears upon the face of the record that certiorari will not lie in this case. Section 414, of the civil practice act, provides in what cases a writ of certiorari will be granted; it is declared therein that the writ may be granted by any court of the territory, except a justice's court. That it will be granted in all cases where an inferior tribunal, board, or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer; and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy.

It has been urged by counsel that as this court, by the provisions of the laws of the territory, has only appellate jurisdiction, it can not issue a writ of certiorari except in and of such jurisdiction; that the language of the statute giving to any court of the territory the right to issue the writ, must be held to mean any court of original jurisdiction. The supreme court of California, under a statute similar to ours, held that the supreme court of that state was only authorized to issue the writ in aid of its appellate jurisdiction, and that the provisions of the act granting to any court the authority to issue it must be held to mean any court of original jurisdiction. (*Miliken v. Huber*, 21 Cal. 166.) And it seems to be the practice of the supreme court of the United States to issue this writ only in aid of its appellate jurisdiction. (*Fowler v. Lindsey*, 3 Dall. 411.) The argument of counsel on this point is entitled to much consideration, but as we can dispose of the case without determining that question we will not now decide as to that point, suggesting that there is much doubt on that question. In order that the writ of certiorari may be granted under the provisions of our statute, three things must appear, to wit: 1. That the court or judge below exceeded his jurisdiction. 2. That there is no appeal provided by law from the judgment or decision of the court. 3. That there is no

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other plain, speedy, or adequate remedy. If any one of these are wanting the writ can not be granted.

First, then, did the court below exceed its jurisdiction? To exceed is to go far—to pass beyond the proper bounds; and if in this sense the court exceeded its jurisdiction, we will have the first of the elements necessary to warrant the granting of the writ. Had the court below then jurisdiction of the subject-matter of the action? The definition given by Bouvier of subject-matter is, “the cause, the object, the thing in dispute.” The thing in dispute in this case was the office of sheriff; both Lindsay and Bryon claimed to be entitled to the office, and the question to be determined was the respective rights of the parties to such office. It is claimed by Lindsay that because it was not alleged in the complaint that one of the defendants had usurped said office, the court or judge had no jurisdiction of the subject-matter.

Section 279 of the civil practice act provides, “that when several persons claim to be entitled to an office, an action may be brought against all of such persons to try their respective rights.” Now it is clear that but one person can be in the actual possession of an office; hence, if the view of Lindsay be correct, section 279 has no force, because several persons can not at the same time usurp an office. But be this as it may, there is no doubt but that the court below had jurisdiction of the subject-matter, and the point made by Lindsay, that the suit could only be maintained in cases wherein it appeared from the complaint the defendant had actually usurped the office, simply raised the question as to whether “the cause of action had occurred,” and it was clearly competent for the court to decide that point. And if there was error in the decision it can be corrected on a proper case brought to this court. Suppose that A. brings suit upon a promissory note against B., and B. interposes his plea to the jurisdiction of the court because the note is not yet due, this clearly presents to the court, the questions: 1. Whether the note is due; and 2. Whether if not due it has jurisdiction. Therefore should the court hold incorrectly on both points, it could

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not be said that it exceeded its jurisdiction, for the law authorized a decision, and if wrong, it was but error to be corrected in the appellate court; but if it were true that the court and judge below exceeded his jurisdiction, is there not a plain, speedy, and adequate remedy provided by law?

Counsel insist in this court that because the case was tried by the judge at chambers, the judgment is a mere nullity *coram non judice*, and void. Hence no appeal will lie. It seems to be well settled that an appeal will lie from a void judgment. (*Hastings v. Moscow Co.*, 2 Nev. 93; *Gray v. Schupp*, 4 Cal. 155; *People v. Durell*, 1 Idaho, 30; *Peabody v. Phelps*, 7 Cal. 53.) Wherefore the fact, if admitted, that the judgment is void, does not prevent the defendant from bringing the case to this court upon a writ of error. But it is farther urged, that as the case was tried by the judge at chambers, and not by the court, no appeal will lie from the judgment of a judge at chambers.

This question was not raised either before the court or judge below. The parties, at the November term of the district court, by agreement, continued the case beyond the term for trial at chambers, and from such act it is presumed that counsel then had no question as to the power of the judge to try the case at chambers under the provisions of section 617, civil practice; but it is not necessary to determine as to that, for the reason that, in our view of the law, defendant has ample remedy, upon a writ of error in this court, to re-examine the decision and judgment of the judge at chambers. This very question, under the provisions of a statute from which ours was copied, was before the supreme court of California, and it was there held, that an appeal may be taken from a judgment of a district judge at chambers, in an action of *quo warranto mandamus* or *certiorari*. And the case then decided was never in the district court, but was commenced before the judge and by him tried at chambers. (*Brewster v. Hortly*, 37 Cal. 15; see, also, 13 Wisc. 21; 1 Id. 597.) It is also held in the same court that an appeal lies from an order made by a judge at chambers. (*Bond v. Pacheco*, 30 Cal. 530.) And the court, in discussing that case, on page

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536, says that there was no want of jurisdiction over the subject-matter, but only an error in its exercise.

It is claimed, however, that the court exceeded its jurisdiction in issuing an order to put Bryon in possession of the office. Section 615 of the civil practice act declares that the courts and judges thereof shall have power to issue all writs necessary or proper to the complete exercise of the power conferred upon them by law. The judge, as shown by the record, tried said action. All the parties to the case were before him, judgment was entered, adjudging that Bryon was entitled to said office, and Lindsay be precluded therefrom. This judgment was of record in full force, and from which no appeal had been taken. Yet, notwithstanding the judgment, Lindsay took possession of the office, in open and direct violation of the judgment, and upon this showing made to the judge by affidavit, the question was presented, whether the judgments and orders of said court could and would be enforced, or whether judicial proceedings should be a mockery and farce; and whether the court had the power to compel obedience to its judgments, and in the issuing of said order, and thus vindicating the majesty of the law, the judge did his duty. But besides all this, it appears from the record that the case is still pending before the court below on motion for a new trial; and in our view, a case should in no event be brought here on certiorari until the district judge has finally disposed of the case; and this seems to have been so ruled in *Devlin v. Platt*, 11 Abb. 398; *People v. Devlin*, 5 Id. 194; 2 Wheat. 221. Whether the court or judge below has committed error of law on the trial of this cause, is not now before us for consideration, and if error has been committed, the statute furnishes the parties injured a plain remedy by writ of error to correct the error of the judge below, if error exist.

It appearing, therefore, that this is not a proper case for granting a writ of certiorari, the writ will be quashed, and proceedings dismissed; and it is so ordered.

Opinion of the Court—Whitson, J.

**THE PEOPLE, EX REL. J. W. HUSTON, RESPONDENTS,
v. A. HEED AND JOHN C. HENLY, APPELLANTS. /**

UNITED STATES DISTRICT ATTORNEY.—The United States district attorney has no right, power, or authority, except that conferred upon him by law prescribing his duties. The designation of “attorney for said territory,” as used in our organic act, is synonymous with that of “the attorney of the United States,” in the organic act of Washington Territory.

TERRITORIAL GOVERNMENT.—It appears to have been the policy of the general government to assimilate the new territories as nearly as possible to the states.

DISTRICT ATTORNEY OF THE UNITED STATES.—Congress having failed to provide that this officer should prosecute in cases arising under territorial laws, he can act as prosecuting attorney only when the courts are exercising jurisdiction as circuit and district courts of the United States.

APPEAL from the district court of Ada county.

Samuel A. Merritt, R. E. Foote, and H. E. Prickett, for the appellants.

H. L. Preston and J. W. Huston, for the respondents.

WHITSON, J., delivered the opinion; NOGGLE, C. J., concurring, LEWIS, J., dissenting.

The question involved in this case is, whether or not the relator, who is admitted to have been appointed under the tenth section of the organic act of the territory, is the public prosecutor in all matters of offense against the territory, as well as all those arising under the constitution and laws of the United States, which question is presented by the demurrers of the defendants to the relator's complaint, and the stipulations of the parties. The tenth section of the organic act of the territory provides “that there shall be appointed an attorney for said territory, who shall continue in office four years, and until his successor shall be appointed and qualified, unless sooner removed by the president of the United States, and who shall receive the same fees and salary as the attorney of the United States for the present territory of Washington.” This is the only provision of law relating directly to this officer, and as there appears to be no law of congress prescribing his duties—and in fact none relating

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directly to the duties of any of the attorneys appointed for the respective territories of the United States—we are compelled to resort to other sources of information to determine the question.

The law districting the United States and prescribing the duties of the judges was passed in 1789, and in that act it was provided “that there shall be appointed in each district a meet person, learned in the law, to act as attorney for the United States in such districts, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned.” From time to time, as new districts were formed within the states, similar provisions were made respecting the appointment of district attorneys and prescribing their duties.

The question, therefore, very naturally arises: “Where does the United States district attorney for a territory get the authority to appear as attorney in any case where the United States is not a party in interest?” He certainly can claim no right except that vested in him by law, and it would be a violent presumption to conclude that, because he is “an attorney for said territory,” therefore, he would have greater power or authority than is conferred by the general and subsequent acts, prescribing generally what duties district attorneys shall perform, when the very act creating him such attorney is silent on the subject, except by implication, and that implication against him. The relator is the attorney of the United States for the territory, which we have a right to conclude by implication, from the fact that the act says that he “shall receive the same fees and salary as the attorney of the United States for the present territory of Washington.” The organic act of that territory is in the exact language of our own, “that there shall be appointed an attorney for said territory,” etc., and the organic act, under which the relator claims, designates the attorney for Washington territory as “the attorney of the United States.” The designation, “attorney for the terri-

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tory," has been used by congress synonymously with "attorney of the United States for the territory," and it must be presumed that congress meant one and the same thing by the two forms of expression.

It appears to have been the policy of the general government, for several years, in forming new territories, to assimilate them as nearly as possible to the states, at the same time reserving that supervisory control over them which is intended by that clause in the constitution which provides that congress shall have power to make all needful rules and regulations respecting the territory of the United States. Congress has made what it deems to be, we presume, all needful rules and regulations respecting this territory, by the appointment of certain officers, the passage of certain laws, and the creation of a legislative assembly with power extending to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of the organic act.

The legislative assembly at its third session provided for three district attorneys for the three several districts of the territory, who were to be the public prosecutors within their respective districts in all matters of offense against the laws of the territory. The legislative assembly at its fifth session repealed the act of the third, and provided in lieu thereof that there should be elected a public prosecutor for each county in the territory. This last act congress, on the fifteenth day of July, 1870, disapproved of and annulled. Congress, therefore, not only declared that a district attorney should not be elected in each county, but disapproved of and annulled that part of the act of the fifth session repealing the act of the third, which provided for three district attorneys, and if the repeal by the legislature of the act of the third session was disapproved of by congress, as a necessary consequence the act of the third session was virtually approved of. Whether or not the disapproval by congress of the repeal, by the legislature at its fifth session, of the act of the third, would have the effect to reinstate the act of the third session, we do not decide. The act of the third session was upon the statute book for more than

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four years—and a similar act had been upon the statute book for two years prior to the one of the third—and while congress had disapproved of laws passed by the legislature, and in some instances restricted its power, this law had not met with a disapproval, while the very act, a part of which repealed it, met with a disapproval at once.

It will not be contended but that congress might provide that this officer should prosecute in all cases where there should be a violation of the laws of the territory, but having failed to do so, while the duties of all other territorial officers have been prescribed with the utmost particularity and certainty, no other conclusion can be arrived at than that the relator would only be the attorney when the courts of the territory were exercising their jurisdiction as circuit and district courts of the United States.

It certainly could not be maintained that a violation of the laws passed by the legislative assembly would be a violation of the laws of the United States, and if such position would be untenable, how could the relator be acting “as the attorney of the United States for the territory” when prosecuting offenders for a violation of territorial laws?

At the time of the establishment of a territorial government in Florida, it was provided that “there shall be appointed, in the said territory, two persons learned in the law, to act as attorneys for the United States as well as for the territory.” There can be no doubt about the scope of the duties devolving upon the two officers created by that act, because they were to act as attorneys for the United States as well as for the territory;” that is, they were to act for both—their duties each to be dual—one of them for east and the other for west Florida.

This serves to illustrate that congress has at all times, in providing a district attorney for each of the territories, intended to make a distinction between the prosecution of cases arising under the laws of the territory and those arising under the laws of congress, and in such appointments to confer the two powers directly and distinctly when it was intended that both should be exercised. In the case of Florida, the distinction was clearly indicated by

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prescribing two duties for each of the attorneys of that territory to perform; and if there be two duties for public prosecutors to perform in the territories of the United States, how could a prosecutor perform the two with no authority except to perform the one?

This view of the case, as to the two classes of duties to be performed in the prosecution of persons for a violation of the laws of the United States and of the territory, is further sustained by several acts of congress, which tend to explain what the highest law-making power of the government intended. The act of June 16, 1856, provided that "the judges of the supreme court in each of the territories, or a majority of them, shall, when assembled at their respective seats of government, fix and appoint the several times and places of holding the several courts in their respective districts, and limit the duration of the terms thereof; provided, that the said courts shall not be held at more than three places in any one territory." The act of June 14, 1858, seems to have been a modification or amendment of that of 1856, and provides "that the judges of the supreme court of each territory of the United States are hereby authorized to hold court within their respective districts, in the counties wherein, by the laws of said territories, courts have been, or may be established, for the purpose of hearing or determining all matters and causes except those in which the United States is a party; provided, that the expenses thereof shall be paid by the territories, or counties, in which said courts may be held, and the United States shall, in no case, be chargeable therewith."

The act of March 2, 1867, amendatory of the fifteenth section of the organic act of Idaho, provides, "that the judges of the supreme court of said territory, or a majority of them, shall, when assembled at the seat of government of said territory, define the judicial districts of said territory, and assign the judges who may be appointed for said territory to the several districts, and shall also fix the times and places for holding court in the several counties or subdivisions in each of said judicial districts, and alter the

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times and places of holding the courts, as to them shall seem proper and convenient.”

From all three of these acts we are to conclude: 1. That in all causes where the United States is a party, trials can be had in but one place in each district; 2. That in all causes where the territory is a party, trials can be had in such counties or subdivisions in each judicial district as shall seem proper and convenient to judges; and 3. That the United States is in no case chargeable with the trial of any cause where the United States is not a party.

It certainly can not, with reason, be contended that the crimes of arson, burglary, rape, robbery, or murder are violations of the laws of the United States, in this territory, any more than they would be in the state of California. The legislature has provided for the manner of the trial of all such offenses, and the mode and extent of the punishment in all such cases; and if it be the right of the relator to appear as the public prosecutor in all cases where there is a crime committed against the laws of the territory, it is his duty so to appear; and, if it is his duty, it is his right to be paid.

Congress has said that “the United States shall in no case be chargeable” with such expenses, and has, by an act of July 15, 1870, relating to Idaho, enacted, “that all acts and parts of acts heretofore passed by the legislative assembly of said territory that provide for the payment of salaries or extra compensation out of the territorial treasury, to officers holding commissions by federal appointment, in said territory, are hereby disapproved of and annulled; and the legislative assembly is hereby prohibited from making any appropriation from the treasury of said territory to any such officers or persons, under any pretense of adding to or increasing their compensation as fixed by the United States.” From which we must understand that the general government intends to confine the relator to such fees and salary as are provided for him by the acts of congress. Again, by act of congress of March 3, 1805, it was provided that “the superior courts of the several territories of the United States, in which a district court has not

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been established by law, shall, in all cases in which the United States are concerned, have and exercise within their respective territories the same jurisdiction and powers which are by law given to, or may be exercised by, the district court of Kentucky district;" and by act of congress of April 18, 1806, it was enacted, "the provisions of the act entitled 'an act for providing compensation for marshals, clerks, attorneys, jurors, and witnesses in the courts of the United States, etc.,' passed February 28, 1799, be and the same is hereby extended to the territories of the United States, so far as the said act may relate to the provisions of the act entitled 'an act to extend jurisdiction in certain cases to the territorial courts,' passed March 3, 1805."

From the last act quoted we are to understand that when the United States district attorneys for the territories were in the discharge of their duties in aid of the territorial courts, when transacting such business as was conferred upon them by the act of March 3, 1805—that is, were engaged in trying cases in which the United States were concerned—then, as to compensation, the act of February 28, 1799, was to control. These acts, so far as the question of compensation is involved, are still in force; except that the fee bill act has, from time to time, been changed, amended, or modified, but in no instance has its application to the district attorneys for the territories been changed, and the fee bill act of February 26, 1853, was so amended by the act of March 2, 1855, as to apply to the then existing territories of Minnesota, Utah, and New Mexico, as fully in all particulars, as if the word "territories" had been used after the word "states," and had read, "in the several states and in the territories of the United States." To assume any other position than the one we think correct, would be to require the relator to perform duties for which congress has said that the general government will neither pay him nor allow the territory to pay him, and we doubt if the relator would desire even that such a duty should be imposed upon him without compensation, even if the government should be so unjust and unreasonable as to require it.

While we do not doubt the power of congress to do as it

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will with a territorial government, even to the doing away with it entirely, the line between the United States and territorial authority is as plain to us, under existing laws of the general government, as is the line between federal and state authority. While very little authority has been extended to the territories, in comparison with that to which the states are entitled, so far as such authority has been extended, it can be exercised as freely and fully as state authority; both being subject to constitutional restrictions and checks, vested in that supreme power, the general government of the United States, whenever either shall have gone beyond its authority.

Judgment of the court below reversed.

THE PEOPLE, RESPONDENTS, v. THE OWYHEE MINING CO., APPELLANT.

ASSESSMENT — TAXATION — POSSESSORY TITLE — IMPROVEMENTS — PUBLIC LAND.—It is proper to list and assess a mill-site and the immovable improvements upon public land, as real estate; but movable property situated thereon, such as a blacksmith shop, retort house, barn, carpenter shop, and the like must be listed, assessed, and taxed as personal property.

IMPROVEMENTS—DEFINITION.—By the term “improvements” on public lands, as used in the revenue law, is meant the buildings and improvements belonging to the possessory claimant, such as miners’ buildings, quartz-mills, sawmills, out-buildings, fences, etc.

ASSESSMENT—TAXATION.—The four classes of property mentioned in the revenue law as subject to taxation, are to be listed, set down, and valued separately in the assessment roll.

ESTOPPEL—TAXATION—ASSESSMENT.—The owner of property subject to taxation is not estopped from disputing the correctness of the descriptions of property listed and given in by him under oath to the assessor.

ASSESSOR.—The assessor is not bound by the valuation placed upon real or personal property by the owner thereof. The assessor is responsible for the correctness of descriptions of property assessed by him.

CONSTRUCTION OF STATUTES.—In construing statutes, words are to be understood in their general signification; and when any doubt arises, although the doubt attaches only to a particular clause, the whole act is to be taken and examined together, in order to arrive at the true legislative intent.

PUBLIC LANDS—TAXATION.—No law of the territory can authorize the sale of the lands of the United States for taxes; such a sale would be void.

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ASSESSMENT.—In order to be valid, an assessment of property for taxation must substantially conform to the requirements of the revenue law in respect to the classification of the property. If it does not so conform it is void.

APPEAL from the third judicial district, Owyhee county.

H. L. Preston and F. E. Ensign, for the appellants.

L. P. Higbee and J. W. Huston, for the respondents.

NOGGLE, C. J., delivered the opinion. WHITSON, J., concurred. LEWIS, J., dissented.

This is an appeal from the district court for Owyhee county from the order of that court refusing a new trial. Judgment was rendered on the twenty-fifth day of November, 1869, against the defendants, for the sum of three thousand four hundred and thirty-seven dollars and ninety-one cents (\$3,437 91) for taxes, and for eight hundred and sixty-four dollars and thirty-one cents costs of action. A motion was made for a new trial, which motion appears to have been filed January 30, 1870, and about that time overruled by the court. This case is now before the court upon appeal from the order refusing to grant a new trial. Several questions have been urged in favor of the judgment for taxes in the case, and also against the same. We have decided that the order refusing a new trial must be reversed for error in assessment hereinafter set forth, and for the following reasons: We do not find that the land on which the quartz-mill and other erections are is taxed, but the facts fatal to this case are that "a mill-site situated on the east side of Jordan creek, about half a mile below Silver City in Owyhee county, Idaho territory, and known as East Ruby, together with a twenty-stamp quartz-mill and appurtenances, a blacksmith shop, barn, retort house, carpenter shop, laboratory, warehouse, boarding-house, office, and other improvements thereon, and known as the Owyhee company's mill property, valued altogether at ninety thousand dollars."

In this case the mill-site, buildings, and erections thereon,

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are all listed together under the head of real estate, and no words were used to limit the interest in the lands intended to be taxed to a claim, or possessing interest, but the term used was "a mill-site" situated, etc., together with a twenty-stamp quartz-mill and appurtenances, blacksmith shop, barn, etc. It is unnecessary to claim that the quartz-mill and other buildings are not sufficiently described; but the description of the land does not conform in any particular to the description required under the third subdivision of the eighteenth section of the revenue act of 1869. The manner of listing the real estate should at least comply with the requirements of the fourth subdivision of said section 18, viz., "the cash value of real estate and the improvements thereon."

The land, mill, and other buildings are listed and valued in one estimate in gross. The mill-site is agreed by both parties to be a possessory interest in public lands upon which there is erected for the owners' convenience the following personal property, viz.: A quartz-mill, blacksmith shop, barn, retort house, carpenter shop, laboratory, warehouse, office, boarding-house, and other improvements. It is proper to list and value the mill-site or land, and the immovable improvements thereon as real estate; but the quartz-mill, blacksmith shop, retort house, barn, carpenter shop, laboratory, warehouse, office, boarding-house, and other erections, etc., being movable property, must be listed, valued, and assessed under the last part of section 5 of said revenue act as personal property.

By section 4 of the revenue act taxable property is divided into two general classes: 1. Real property which simply means real estate. 2. Personal property. The term real property includes lands, and immovable improvements thereon, and the term personal property shall include all property except real property. By section 5 of said act, real estate, or real property is declared to mean: 1. The ownership of any land. 2. Any possessory claim or interest in land, public or private, where the title, meaning the fee, is not in the possessory claimant, and the same revenue law provides that possessory claims shall be listed to the claim-

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ant under the head of real estate, while personal property in section 5, aforesaid, is defined to be all houses, buildings, fences, structures, erections, or other improvements built or erected on any lands, whether such lands be private property, or the property of the territory, or of the United States, etc. It is claimed by the plaintiffs, that these sections of the revenue act are inconsistent. That section 4 defines real estate to be lands and immovable property thereon, while section 5 makes buildings, fences, etc., on land (both private and public) personal property, because fences and buildings are claimed by the plaintiffs to be immovable property, a part of the realty. If these two sections can be harmoniously construed so that the validity of both shall be sustained, and so that both may stand in force, then the plaintiff's position is not sound, and the admitted errors are fatal to the case.

Evidently, the ownership of land shall include all real estate, in its common law signification, where the fee belongs to the person in possession, and the personal improvements belong to the owner of the fee. This is real estate in its highest sense. Lands, tenements, and hereditaments, are included under the general term, land. By including all leasehold estates, and all possessory claims and actual possession of public lands as the second class of realty, to be listed and taxed as such, then all improvements not immovable, such as buildings, fences, etc., put upon public lands, and all buildings, etc., put by the lessee upon his landlord's estate, which, by the tenure of the lease, are not to belong to the landlord, are, in contemplation of the revenue act, subject to be removed off, and do, in fact, belong to the tenant; and of this character of property are buildings, fences, etc., on public lands of the United States; and all such property is to be listed as personal property to the owner of the buildings, etc., and not to the owner of the fee; and this is upon the ground, that no permanent fixture can attach to a mere possessory interest in land. Hence, this rule must be particularly followed in regard to public lands, where the fee is in the United States.

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If A. is the owner of land in fee, and B. has a leasehold estate in the land for any term, great or small, and has a shop or any other building, or fence, erected thereon by him, and which belong to him, the land in fee, with the immovable fixtures belonging to the fee, must be listed to the owner of the fee, A., as realty; the leasehold estate of B. must be listed to him as realty, and the shop, buildings, or other improvements of B., which belong to him, must be listed to him as personal property; and where a party holds a possessory interest, or claim, upon lands belonging to the United States, that interest must be listed to him as real property, particularly showing whether it be a possessory claim, leasehold estate, or whatever it may be; but his buildings and improvements on such claim must be listed to him as personal property, with a description of the property. This construction is in harmony with the provisions of section 18, aforesaid, which provides that the assessment-roll shall contain, "a list of all real estate, improvements on public lands, and other personal property."

All real estate extends to and includes both subdivisions of real estate above stated; all improvements on public lands means the buildings and improvements belonging to the possessory claimant, such as miners' buildings, quartz-mills, sawmills, out-buildings, fences, etc. All personal property means all transitory personal property, of whatever nature or kind not otherwise exempt, and all but the first of these classes, are to be taken and considered as personal property.

The four classes of property mentioned in the revenue law are to be listed, set down, and valued separately in an assessment roll: 1. The date of the assessment. 2. The taxpayer's name. 3. A description of property; and this description should particularly describe each class of property as the law requires—all improvements on public lands, describing as nearly as possible the location of such improvements. 4. The cash value of real estate and improvements thereon. 5. The cash value of all improvements on real estate, when the same is assessed to a person other than the owner of said real estate. 6. The cash value of all per-

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sonal property, except improvements on real estate or public lands, taxable to each. This last class of other or transitory property is not required to be particularly described in the assessment roll; its value is only given in its column. 7. The total value of all property.

We think when properly considered, the law is consistent, reasonable, and just; nothing seems to have been left out, and nothing need be supplied. The plaintiffs in this case seeming to admit that the revenue law has not been complied with, insist that the appellants should be estopped from denying the correctness of the descriptions given under oath by themselves to the assessor. We do not so understand the case or the law that governs it. This might be conceded to be a proper rule under section 11 of the revenue law of 1869, which provided that the president, cashier, treasurer, or managing agent of a corporation, association, or company, shall give to the assessor when demanded by him, a particular description, under oath or affirmation, of all the real estate owned, claimed by, or in the possession, or control, of such firm, corporation, association, or company, also a complete statement under oath or affirmation, of all personal property, within said county, belonging to such person, firm, corporation, etc.; which statement shall be entered by the assessor in a book to be kept by him for that purpose, etc.; if the defect in the assessment roll in this case was confined to the description of the property merely.

Section 11 of the act aforesaid does not require the owner, officer, or agent, etc., to list the property, real or personal, under proper and appropriate heads, or to attach any value thereto, neither would the assessor be bound by an act of that kind, should it be done. The provisions of section 11 are enacted for the information of the assessor, which he may adopt or reject, just as in his judgment he may think proper. We can not understand from section 11 how the defendants can be estopped from objecting to the assessment in this case. The assessor is responsible for its correctness. The rule for the interpretation of statutes is, that words are always to be understood as having a regard to the

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subject-matter, for that is always supposed to be in the mind of the legislator, and all his expressions directed to that end. Words are to be understood in their general signification, and when any doubt arises, although apparently the doubt attached only to a particular clause, the whole act is to be taken together, and to be examined in order to arrive at the true legislative intent.

The intention of the legislature, as is clear from the whole act, was to assess and levy a tax upon the right to possess and occupy any public or private land, within the territory, and not to assess the fee in such lands, whether public or private, to the lessee or individual occupant.

If this interpretation of the law is wrong, then the consequences of the law must fail, and the evil can only be remedied by a change of the law. No law of the territory can authorize the sale of the lands of the United States for taxes. Such a sale would be void. By this interpretation of the act, the assessor is required in listing the property of a taxpayer, after giving the date of the assessment, and the name of the taxpayer, etc., then to set down his land belonging to him in fee, including the immovable improvements thereon, with such a description as is required by section 18, and to assess such land and immovable improvements in a valuation, placed in an appropriate column. Then, to set down any possessory claim or any leasehold estate which he may hold, describing it as possessory or leasehold interest, so as to designate its extent and character, with a description of the land upon which the interest is held, similar to the description of the land of the first class as near as may be, where the fee is taxed, giving the value of the possessory or leasehold interest, as the case may be, without any regard to the value of the fee, which fee, if private property, must be taxed to the owner thereof, and if the fee is in the United States, then the fee can not be taxed. The buildings, structures, etc., belonging to the taxpayer, who does not own the fee upon which each structure stands, shall be listed as improvements on the public lands, and such improvements shall be described and val-

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ued separately from the land on which they stand, and from the possessory interest therein, as the first class of personal property.

As the mode of classifying property has been entirely overlooked in this case, and no words are in the description to indicate that the real estate interest in the mill-site was a possessory interest, while upon the trial it is admitted that the fee of the land is in the United States, it follows from necessity that the assessment is erroneous, for it does not substantially conform to the provisions of the statute, and must therefore be held void.

It is unnecessary to determine other questions raised in this case, as the one already decided is fatal to it. The joining of real estate and personal property under the revenue law of 1869, is an error that must reverse the order in the case. This case was strongly urged upon the argument, as being a case founded upon the law so unreasonable, that it could not be complied with by the assessor. If we thought this was so, our opinion might be different. Really we are at a loss to understand why the assessor could not, under the heading of "Description of Property," in the form prescribed by section 18 of the revenue act of 1869, have described every conceivable kind of property mentioned in the act. That column was provided for the purpose of describing minutely the property of the person assessed, whether it be, 1. "Real property," which includes land and improvements thereon, belonging to one and the same person; or, 2. The possessory right or interest in land, less than a fee-simple estate, which must be assessed separately from the improvements on the same; or, 3. The improvements on said last described interest in lands which are classified by the act as one of the kinds of personal property; or, 4. All other kind and species of personal property.

For the benefit of the assessors of this territory, we will now on paper illustrate the filling out of the form given in the revenue law of 1869. Take the case of John Doe for example, who has every kind of property contemplated, as follows, to wit:

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ASSESSMENT-ROLL OF PROPERTY FOR THE FISCAL YEAR ENDING APRIL —.

TO ALL OWNERS AND CLAIMANTS, KNOWN AND UNKNOWN.

Date of Assessments.	Taxpayer's Name.	DESCRIPTION OF PROPERTY.	Lot.	Block.	Range.	Number of acres.	Value of land and improvements.	Value of improvements on R. E. assessed to persons other than the owners of said R. E.	Value of personal property.	Poll tax.	Total value.	Territorial tax.	County tax.	Total tax.	Remarks.
1871 March 5.	John Doe..	A tract of land described, etc., and situated in Owyhee Co., I. T., together with immovable property thereon.....	.....	.....	.....	160	2,000	.....	.....	.....	.....	.....	.....	.....	.....
		The possessory interest in and to a tract of land belonging to the U. S., described, etc., and situated in Owyhee Co., I. T.....	.....	.....	.....	160	1,000	.....	.....	.....	.....	.....	.....	.....	.....
		Improvements, structures, etc., situated on said last-described premises.....	1,000
		Horses, mules, and all other personal property.....	500	4,500

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As there was evidence of personal property separately assessed in the case, which assessment is not invalidated by any of the objections raised, the order refusing a new trial should be reversed, and this case should be remanded back to the district court with directions to grant a new trial, according to this opinion.

The order refusing a new trial in this case is hereby reversed, and the cause remanded for a new trial.

LEWIS, J., dissenting:

I can not agree with the majority of the court in the conclusion they have reached in this case, nor in the reasoning whereon it is based; for most certainly their views are unsupported by authority, and to my mind not founded upon reason.

The point made by the majority of the court, and upon which their decision is based, is this, that the possessory title to the mill-site and improvements thereon, are jointly assessed, while in their view they should be separately valued. That the description should all be put down in one column, but the value of the possessory title and improvements should be set down in separate columns; the taxes, doubtless, are levied upon the total value of both. Why, then, should they be set down on the assessment-roll separately? No answer is given but "thus saith the law;" but in point of fact such is not the case. Section 5 of the revenue law declares that the term "real estate" shall mean and include the possessory title to lands, while section 18 requires the assessor, under item three in his assessment roll, to list all real estate and improvements thereon; hence as the possessory title to the mill-site is by the statute called real estate, as to this case, it is as if the law declared that the assessor shall in one column put down the possessory title and improvements thereon; then in item four, section 18, he is required to set down the value of the real estate and improvements thereon, not separately as held by this court. Section 41 of the law authorizes a joint judgment against the real estate and im-

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provements when jointly assessed, most clearly indicating their joint assessment.

The law then declares that the assessment may be joint; that the real estate that is in this case, the possessory title, and improvements, may be jointly assessed; in fact, the words are that the assessor shall put down in one column the value of the real estate and improvements, and I insist that a court "must not be wiser than the law;" but the majority say that the form of the assessment-roll is set out in section 18, and that the form used by the assessor is different from such form. That is true; but if we look at section 18, it declares that the form shall be in substance like the one set out, and here is wherein, in my view, the majority of this court have erred. They have taken the shadow and not the substance of the law, the letter and not the spirit; they have failed to examine the reason of the law.

The elementary rule in the construction of the law is to examine the reason and spirit of it. (1 Bl. 61; Sedg. 236.) We must look at the cause which moved the legislature to enact the law. (1 Bl. 61; Broome's Maxims, 536.) And it is not a true line of construction, to decide according to the letter, but courts will rather consider what is its fair meaning, and will presume the intent. (Broome's Maxims, 536.) The rules are founded upon reason and common sense, and have existed for ages. What, then, is the reason, object, and purpose of the description of property being given? Most clearly, we answer, to let the taxpayer know that his property is assessed, the amount of the assessment, and the sum due for taxes, that he may, if necessary, go to the board of equalization to have the same equalized, and may pay his taxes. This seems to be the rule as declared in Blackstone on Tax Titles; in 25 Cal. 296; and 2 Comstock, 66.

When, therefore, the description and valuation is such as to answer the object and purpose of the law, the end is accomplished; and, in the case before us, the defendants knew that their property was assessed, the amount thereof, and were in no way misled. Again, when either of two constructions may be given to a statute, one of which de-

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feats the object of the law, while the other carries it out, the latter should prevail.

The purpose of legislation should not be defeated on a technical nicety, especially when to uphold the act of the assessor in the case can work no possible injury to any one, while, with the view of the majority herein, over a quarter of a million of dollars is stricken from the tax-roll.

THE PEOPLE, RESPONDENTS, v. THE OWYHEE LUMBER COMPANY, APPELLANT.

TAXATION—IMPROVEMENTS—PUBLIC LANDS.—Improvements upon lands belonging to the United States are not real estate within the meaning of the revenue act of this territory; and the listing of any such improvements as real estate by an assessor is fatal to the assessment.

JUDICIAL NOTICE.—This court is bound to take notice of the long-established and well-known usages of the country.

PRESUMPTION—OFFICER.—Every officer is presumed to do his duty.

ASSESSMENT—ASSESSOR—TAXATION.—Where an assessor fails to discriminate between improvements where the owner thereof is also the owner of the land upon which the same are situated, and those cases where the improvements are upon public lands, this court can not arrive at the conclusion that a want of such discrimination did not mislead him in assessing the property, as to value.

CONSTRUCTION OF STATUTES.—Neither courts nor assessors have any discretion in the construction of statutes, when their provisions and requirements are plain and easily understood.

ASSESSMENT—TAXATION.—When the aggregate of a column of figures is preceded by a dollar mark, the result must follow that each item of such column is also dollars, although not preceded by such mark; and this, on the well-established maxim in mathematics, that the whole is equal to all its parts.

APPEAL from the third judicial district, Owyhee county.

Rosborough & Preston, for the appellants.

L. P. Higbee, for the respondents.

WHITSON, J., delivered the opinion. NOGGLE, C. J., concurred. LEWIS, J., dissented.

One of the questions involved in this case is substantially the same as that in the case of *The People v. Owyhee*

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Mining Co., in which the opinion of this court has been delivered at length. The questions involved, however, we consider much stronger against the affirmance of the order of the court below refusing a new trial than in the case just cited. In that case the assessor listed under the head of "Real Estate, Description of," a mill-site, situated, etc., together with a twenty-stamp quartz-mill and appurtenances, etc.; from which we are to infer, that not only the improvements were assessed, but the site upon which they were located, and, while there is no such heading prescribed by the revenue act, the error of the assessor consisted mainly in assessing under the heading what the law expressly provides is personal property; and not only that, but values both the mill-site, the title to which is admitted to be in the United States, and the improvements thereon in bulk, so that it would be impossible for any one to determine from the assessment-roll at how much the possessory right of defendant was assessed, or at how much the improvements were assessed.

In this case the assessor listed under the same heading, "a sawmill, situated at the head of Boulder creek in Owyhee county, Idaho territory, and known as the Boulder Creek Mill."

Unlike the case of *The People etc. v. Owyhee Mining Co.*, it does not appear that the defendant herein claimed even a possessory interest in the land or place where this sawmill was situated, and for aught this court knows or any court could know, from the assessment roll, this sawmill might have been portable; and, whether so or not, or whether or not it was situated on land in which the defendant claimed a possessory interest, it is quite clear to us that it is in no sense real estate as defined by the revenue act. It may be, and it has been urged, that these are mere technicalities; but we think not, but that no substantial compliance has been had with the law. This court is bound to take notice of the long-established and well-known usages of the country. Every officer is presumed to do his duty, is equally as true.

No one will contend that a building situated on public

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land would be as valuable as if the owner of the building owned the land also. In all of these cases it seems that the assessor failed to discriminate between improvements when the owner of the improvements was also the owner of the land, and those cases where the improvements were on public land. Having failed to do this, how can we arrive at the conclusion that a want of this discrimination did not mislead him in assessing the property, as he says "in good faith," which of course we do not question. We do not think that assessors or courts have any right to say this or that is sufficient when the legislature has undertaken to say that something else only is sufficient.

There is another question raised in this case not raised in the other cases at bar, and that is that there is no indication as to what the different values of property are intended to represent, whether eagles, dollars, cents, or mills. We do not think this objection well taken where it is evident and apparent upon the face of the assessment what the figures represent by a reference to the footing. The following is the substance of the roll in that particular, viz.: A saw-mill, etc., four thousand; a lot of timber land, etc., one thousand; tools and furniture, three hundred; two horses and wagons, four hundred; total, five thousand seven hundred dollars.

It is a well-established maxim of mathematics, that the whole is equal to all its parts. It can be no less or greater. All these sums amount to five thousand seven hundred dollars, and if any one of them consisted of anything else than dollars the result could not be dollars alone, corresponding in amount to the aggregate of the four sums named.

We think the order of the court below should be reversed and the case remanded for a new trial, upon the same ground as the case of *The People, etc. v. Owyhee Mining Co.* Judgment reversed and a new trial ordered.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

JANUARY TERM, 1872.

PRESENT:

HON. DAVID NOGGLE, CHIEF JUSTICE.

HON. W. C. WHITSON, } JUSTICES.
HON. M. E. HOLLISTER, }

JOHN B. RAMSAY, PLAINTIFF IN ERROR, v. WM. P.
HART, DEFENDANT IN ERROR.

EQUITABLE ACTIONS—VERDICT—JURY TRIAL.—No action, purely equitable in character, can proceed to a decree upon the verdict of a jury as the foundation thereof; but if a jury is called in such a case, it must be to aid the court in determining questions of fact, which, when found, are the findings of the court; and the decree must be the result of the judgment of the court or judge thereof.

TRANSCRIPT—RECORD.—Nothing in a transcript brought to this court can be considered, unless by the provisions of the statute or the order of the judge, it is made a part of the record of the case. Of what the record consists, considered.

McBride & Henly, for the plaintiff in error.

J. Brumback & E. J. Curtis, for the defendant in error.

WHITSON, J., delivered the opinion. NOGGLE, C. J., and HOLLISTER, J., concurred.

In this case the plaintiff in error seeks to reverse the judgment of the court below: 1. Because the case was com-

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menced and tried and judgment rendered as in an action at law, while the proofs showed, if they showed anything, that the case should have been brought in equity. 2. Because the proofs were insufficient to support even a decree in equity if the case had been commenced on that side of the court.

It is not necessary, in disposing of this case, to pass upon any of these questions, yet we may be allowed to venture the opinion that there can be no doubt but that if the evidence adduced on the trial of an action at law should disclose that the action should have been brought in chancery, no judgment could be sustained. It is equally clear that no suit in equity can proceed to a decree upon the verdict of a jury as the foundation thereof, but that if a jury is called it must be to aid the judge in determining questions of fact which, when found, are the findings of the court, and the decree must be the result of the judgment of the court or judge. (*Dunphy v. Kleinsmith*, 11 Wall. 610.)

It seems to be conceded upon both sides, that the case, as disclosed by the complaint and answer, is clearly an action at law, and the case having been tried as such, it only remains for us to determine how much of the transcript we can consider here; and after that what error, if any, appears therein. Section 317 of the civil practice act, provides that the transcript shall contain a copy of the writ (of error) and return, the pleadings, the journal entries, and bills of exceptions, the execution and return, and such other matters as the court or judge shall have ordered to be made a part of the record. All that we can consider of this transcript, therefore, is the complaint and answer, the journal entries, which include the verdict of the jury, the judgment rendered on it, and the motion to set the same aside, nothing else having been by order of the judge, made a part of the record, and not being so by force of law, we think we are precluded from considering more than we have enumerated. Upon a thorough examination of the record before us, we fail to find any error.

Judgment as rendered upon the verdict of the jury is affirmed.

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Opinion of the Court—Hollister, J.

S. ALEXANDER & CO., DEFENDANTS IN ERROR, v.
ALONZO LELAND ET AL., PLAINTIFFS IN ERROR.

SUMMONS—JUDGMENT—EXECUTION.—A summons to A., B., C., or D. is a nullity, inasmuch as it is in the alternative, and not to all, nor to either of them. A judgment and execution, upon such summons, are likewise void, for want of jurisdiction of the defendants.

APPEAL—APPEALABLE ORDER.—An order overruling a motion for a stay of proceedings under a void judgment may be appealed from, or brought to this court for review, by writ of error; and such appeal brings under review the whole record in the case.

WRIT OF ERROR—PARTIES.—A writ of error may be sued out, under the statute, by one or more of several defendants, without joining their co-defendants in the writ.

JUDGMENT.—A judgment to be valid must be certain and conclusive as to the subject-matter and parties to the action, and must be capable of execution.

ERROR to the district court of the first judicial district, Idaho county.

A. Leland and McBride & Henly, for the plaintiffs in error.

A. E. Isham and H. E. Prickett, for the defendants in error.

HOLLISTER, J., delivered the opinion. NOGGLE, C. J., concurred. WHITSON, J., dissented.

This case comes here from the district court of Idaho county on a writ of error sued out by Leland and Wood. That it is one of a somewhat peculiar character, reference to the proceedings in the court will, we think, abundantly show. The complaint is as follows:

In the first judicial district of Idaho territory, Idaho county, Hon. M. Kelly, Judge.

S. Alexander & Co., against E. B. Johnson, E. R. Sherwin, J. W. Poe, Joseph Griffith, and Alonzo Leland or John Wood, partners doing business under the form and style of the Rescue M. & M. Co., in said county, as defendants, and for cause of action, complains and alleges as follow, to wit. Here follows a statement that the defendants compromising the Rescue M. & M. Co., are indebted to the plaintiff in the sum of thirteen hundred and forty dollars and ninety-

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one cents, for goods sold, etc., upon an express or implied contract, for the direct payment of money in gold coin. To this complaint the name of S. Alexander was subscribed, as well as to its verification.

The complaint was filed on the seventh day of September, 1869, whereupon the following summons was issued:

“Territory of Idaho, County of Idaho, ss.

“S. Alexander & Co., plaintiffs, v. E. B. Johnson, E. R. Sherwin, J. W. Poe, Joseph Griffith, and Alonzo Leland or John Wood, doing business as the Rescue M. & M. Co., defendants.

“In the district court of the first district, Idaho territory, Idaho county.

“To E. B. Johnson, E. R. Sherwin, J. W. Poe, Joseph Griffith, and Alonzo Leland or John Wood, defendants above named.

“In the name of the people of the United States of the territory of Idaho.”

Then follows the usual statement and notice to appear and answer the complaint.

This summons was served upon all the persons named in it, with the exception of Alonzo Leland.

On the second day of October, 1869, the following answer was filed in the clerk's office, to wit:

“S. Alexander & Co., plaintiffs, v. E. B. Johnson, E. R. Sherwin, J. W. Poe, Joseph Griffith, and A. Leland or John Wood, defendants.

“The defendants above named come into court, and for cause of answer to the complainants' complaint deny the allegation, etc., and conclude as follows: Defendants therefore pray that this court will not grant a judgment against them according to the prayer of the plaintiffs' complaint, or any other judgment, than one for thirteen hundred and forty dollars and ninety cents in lawful money of the United States.

LELAND & POE,

“Att'ys for def'ts, R. M. & M. Co.”

This answer was verified and served upon Alexander, on the fourth day of October, 1869. On the second day of

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the July term of the court, to wit, on the sixth day of July, 1870, judgment was rendered by the court as follows:

“In the district court of the first judicial district of the territory, in and for the county of Idaho.

“S. Alexander & Co. v. The Rescue Milling and Mining Co.

“Now come the plaintiffs, by W. G. Langford and S. S. Fenn, their attorneys, and move the court for a judgment herein, and it is ordered that judgment be entered against the defendants for the sum of one thousand three hundred and forty dollars and ninety-one cents, in lawful money of the United States, with legal interest on the same from the date of the filing of the defendants’ answer.”

On the eleventh day of July the following entry was made upon the journal of the court:

S. Alexander & Co. against E. B. Johnson, E. B. Sherwin, J. W. Poe, Joseph Griffith, and Alonzo Leland or John Wood, partners, doing business under the firm name and style of the Rescue M. & M. Co., defendants.

This cause came on regularly for trial on the fifth day of July, A. D. 1870. W. G. Langford and S. S. Fenn, Esqs., appearing as counsel for plaintiffs, and A. Leland and J. W. Poe appearing for defendants; whereupon the plaintiffs, by their attorneys, moved the court for judgment upon the complaint, and answer filed herein, whereupon the court, being fully advised in the premises, and by reason of the law and the premises herein, it is ordered and adjudged that the plaintiffs, Alexander & Co., do have and recover of and from the defendants, the sum of thirteen hundred and forty dollars and ninety-one cents, principal, and the further sum of ninety-four dollars and forty-four cents interest, amounting to the sum of one thousand four hundred and thirty-five dollars and thirty-five cents, principal and interest, together with said plaintiff’s costs and disbursements, amounting to the sum of one hundred and six dollars and twenty-five cents, and that they have execution therefor.

On the twentieth day of July following, Leland & Wood entered their motion for a stay of all proceedings under the judgment affecting in any manner the property, or interest

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in any company property, belonging to John Wood or Alonzo Leland, on the ground that the judgment is irregular and uncertain, in this, that it is jointly against E. B. Johnson E. R. Sherwin, J. W. Poe, Joseph Griffith, Alonzo Leland, or John Wood, and in the alternative, and therefore void as to the last named persons, or either of them. This motion was overruled by the court, and duly excepted to, and made a part of the record.

It is from this order of the court that the plaintiff in error brings the case here for review. That such an order may be appealed from by a party aggrieved by it, there can be no doubt. Section 470 of the civil practice act is as follows: "Every direction of a court or judge made and entered in writing, and not included in a judgment, is denominated an order." The supreme court of California, in *Gilman v. Contra Costa*, 8 Cal. 52, say: "An order may be defined to be a judgment or conclusion of the court upon any motion or proceeding. It means, cases where a court or judge grants affirmative relief, and cases where relief is denied." Section 312 provides, "that any final judgment, order, or decision of a district court, except in chancery, may be re-examined upon a writ of error in the same court for error in fact; in the supreme court for error in law." Whether by appealing from such an order the whole record of the case is brought under the review of this court in cases like the one at bar, is a question we will consider hereafter.

As it is claimed by the defendants in error that this writ is improperly sued out because the names of all the parties defendants in the suit below are not named in the writ of error and in the citation, it becomes necessary, before proceeding to the consideration of the merits of the case, to decide the preliminary question thus presented. It is admitted that at the common law, such an objection would be well taken, and that in consequence, the appellate court could not proceed to a hearing of the case until all the parties to the judgment below were made parties in such appellate court.

It is urged, however, and properly, we think, by the plaintiffs in error, that by the provisions of section 323 of

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the civil practice act, the rule of the common law has been changed. This statute gives to any persons who may be a party or privy in any judgment, order, or decision, the right to have the same reviewed in this court. It is urged, however, by the defendants' counsel that though any of the persons or parties named in the act have the legal right to prosecute a writ of error for their own benefit, yet it must be done in the names of all the parties jointly interested in the judgment below, and the plaintiffs in error not having done so, that this writ must be dismissed. In this view we are not prepared to concur.

The reason why, at common law, all persons interested in the judgment should be made parties in the appellate court, is that any final decision of such court should bind them, and thus be conclusive. It is founded on the familiar principle that no person not a party to a judicial proceeding shall be bound by it. The statute, however, has expressly provided that when any writ of error is prosecuted by those who are parties or privies to the judgment complained of, and it is reversed, such reversal shall inure to the benefit of all parties and privies thereto; and no other party or privy shall thereafter prosecute a writ of error for the same cause.

The effect of this provision is to bind all other persons interested in the question by the judgment of the appellate court in the same manner and to the same extent as if they were the actual parties.

Under the statute all parties to the judgment below derive as much benefit from its reversal as if they had been made parties plaintiff; and at the same time the adverse parties are protected from any further litigation of the same question by those who are not, as well as by those who are made parties to the proceedings here.

We now come to the question, whether an appeal from the order of the court below in overruling the motion for a stay of all further proceeding, under the judgment, brings the entire record of its proceedings under the revision of this court.

In our view, this must necessarily be the case. The mo-

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tion is founded upon an alleged error of the court in rendering a judgment which, it is claimed, is a nullity; and in order that this court can determine whether the motion should have been sustained, it becomes necessary to look into the entire record.

It is a well-settled principle of law, that no judgment can be of any validity, unless the court has jurisdiction of the parties against whom it is rendered. This principle is so familiar that no reference to authorities is needed to support it. This jurisdiction can only be acquired in two ways: first, by due service of legal process; and, second, by a voluntary appearance of the party for the purpose of a trial. In neither of these modes did the court below gain jurisdiction of the defendants in the suit. The summons runs in the name of the people, etc., in a suit in which Alexander & Co. are plaintiffs, and is addressed to E. B. Johnson, E. R. Sherwin, J. W. Poe, Joseph Griffith, and Alonzo Leland, or John Wood, doing business as the Rescue M. & M. Co., defendants.

From the summons, it is impossible for this court to ascertain what persons composed the Rescue M. & M. Co. It may be the five persons first named, or it may be John Woods alone, and the notice was either to the former or the latter; and being in the alternative, it was not for the officer serving it to determine upon whom service should be had, nor can this court so determine. The only conclusion, therefore, that can be legitimately drawn is that, it being addressed to no party in particular, it was not addressed to any one, nor was it notice to any one, and was consequently void.

It is insisted by the counsel for the defendants, that inasmuch as the defendants below appeared and put in an answer to the complaint, they voluntarily submitted themselves to the jurisdiction of the court. It will be perceived by the title of the suit, as stated in the answer, that the same uncertainty is found in it as in the summons. The answer shows that the defendants Johnson, Sherwin, Poe, Griffith, and Leland, or John Wood, parties doing business under the firm and style of the Rescue Milling & Mining

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Company, came into court, but it does not appear whether it is the first five persons named, or John Wood, who composed the company, and whom they appeared for.

It will be seen that it is not a personal appearance of the parties, but an appearance by attorneys, and the court can not say whether such an appearance shall bind one or all of the persons named. Before an appearance by attorney can be held to bind a party, it must be seen that he appears for such party, and that in so certain and undoubted a manner as to make him responsible to him for his acts. To say that when an attorney appears for either one or another person he binds them both or either, is to carry the doctrine of agency beyond any limits heretofore discovered in the books or in principle. It is true that at the close of the answer, it is stated that it is put in by Leland & Poe, attorneys for defendants R. M. & M. Co., and it may be that such an answer would authorize a judgment against the company for which it professed to be put in. On this point, however, it is unnecessary to express an opinion. Independently, however, of such considerations, the judgment, in itself, must be held to be a nullity.

The reasons urged against the validity of the process apply with equal force to the judgment. It is a judgment in the alternative against E. B. Johnson, E. R. Sherwin, J. W. Poe, Joseph Griffith, and Alonzo Leland, or John Wood, partners, etc. If we can not determine as to whom the summons was directed, and upon whom it was served, it follows that we can not determine as to the parties against whom the judgment is rendered, and for the same reasons. A judgment to be valid must be conclusive upon the subject-matter, and also as to the parties to it, and it must be capable of execution. It must be so certain as to the persons that its execution may be enforced against their property. If it be a joint judgment, the execution must be against the joint property. If against one, his individual property is liable.

Under our statute, if suit be brought against defendants jointly and not severally liable, and a portion only are served with process, judgment must be entered against all

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the defendants, but so as to be enforced against the joint property of all, and the separate property of those served. Without the aid of the statute, all the parties to a joint contract must be made parties to the suit before the court can entertain jurisdiction. If, however, as in the case at bar, the suit be upon a joint contract, and the judgment be against one or another party, it can not be executed, for the reason that neither the joint property nor the property of one of the parties can be subjected to its payment.

There is another point insisted upon by the defendants in error, which we will now proceed to notice. It is this, that unless all the parties plaintiff in the judgment below are brought here by the proper citation, or by their voluntary appearance, this court can not proceed to a final determination of the case. This would be a valid objection if the facts sustained the position.

The suit below was instituted in the name of S. Alexander & Co., but it does not appear from the complaint nor the summons who composed the firm, nor that there was any other person interested in the suit than Alexander himself. The complaint was signed and verified by him alone, and, so far as it is made to appear to the court, for his sole benefit. The answer was made to the complaint of S. Alexander & Co., and the judgment was entered in favor of the same name. Indeed, it nowhere appears in any of the proceedings of the court below that any other person than Alexander composed the firm of Alexander & Co., or had any interest in the subject-matter of the controversy. The plaintiff in the suit in the district court, not having chosen to disclose the name of any other person as a party to the action, it does not lie in his mouth to claim that some other person should have been joined with him as a defendant in error.

It may be said, however, that the plaintiffs in error, in suing out their writ and executing their undertaking, as well as in issuing the citation, have made Schnyder a party, and that they are estopped to deny that he should be made such in this proceeding.

We think that such is not a correct view of the question.

Points decided.

The plaintiffs in error might have omitted his name altogether in the writ, undertaking, and citation, and no error would thereby have intervened. The mere fact that they voluntarily chose to name him in their proceedings, to bring the case here, does not of itself conclude them. Suppose they had named any other person whose name did not appear in the suit below, in their citation and undertaking, it would not follow that this court must make him a party and hold him bound by any decision it might make in the case. All that this court can do is to look to the record of the proceedings in the court below to determine who are the proper parties, and no claim outside of such record can be considered by us. The record failing to show that Schnyder was one of the firm of Alexander & Co., or that he had any interest in the suit, we must hold that the plaintiffs in error were not required to bring him here as a party defendant.

This court, having jurisdiction of the necessary parties, have no hesitation in taking cognizance of the case.

The judgment of the district court being null and void, the order is therefore reversed.

THE PEOPLE, EX REL. J. W. HUSTON, RESPONDENTS, v.
G. W. HUNT, APPELLANT.

APPELLATE COURT—RECORD—STATEMENT—BILL OF EXCEPTIONS—This court can not consider alleged errors not apparent in the record, nor brought into it by a statement or bill of exceptions, properly settled and signed by the judge of the district court, or agreed to by the parties.

AMENDED PLEADINGS.—When an amended complaint is filed, it takes the place of the original, and all subsequent proceedings in the case are based upon the amended pleading.

VERIFICATION.—When the complaint is not verified, the answer need not be verified.

EXCEPTION.—If a party desires to have a decision of the district court reviewed by this court, he must except thereto when the ruling or decision is made; and he must also preserve and bring up such exceptions by bill of exceptions or statement.

STATUTORY CONSTRUCTION.—Statutes should be so construed as to give force and effect to each and every part thereof, if it is possible to do so.

Opinion of the Court—Noggle, C. J.

APPEAL from the second judicial district, Ada county.

A. Heed, for the appellant.

J. Brumback, for the respondents.

NOGGLE, C. J., delivered the opinion, WHITSON and HOLISTER, JJ., concurring.

This is an action prosecuted in behalf of J. H. McCarty, under chapter 4 of the civil practice act, to recover the possession of the office of county commissioner, which is claimed to have been, before that time, illegally usurped and taken possession of by the defendant, appellant. Judgment was rendered by the district court against the defendant, appellant, and the case is now brought to this court on appeal, to reverse that judgment.

On the part of J. H. McCarty it is claimed, that on the second Monday of August, 1868, pursuant to the statute in such cases made and provided, he, the said J. H. McCarty, was duly elected a county commissioner for the term of three years, commencing on the first Monday of January, 1869; that after he was so elected, and before the said first Monday in January, he duly qualified as such commissioner; that on the said first Monday in January, 1869, the said J. H. McCarty entered into the full and complete discharge of the duties of said office, and that he so continued in office as county commissioner for Ada county, and that he continued to enjoy the same and all the rights and emoluments thereof, until the eleventh day of July, 1870; that upon that day, G. W. Hunt, the said defendant, appellant, usurped and unlawfully intruded himself into the said office of county commissioner of Ada county, and took possession of said office and the books and papers belonging thereto; that he continues unlawfully to hold and exercise the said office of county commissioner of Ada county, and that he withholds the same from the said J. H. McCarty.

The said G. W. Hunt, defendant below (appellant), answering the complaint, alleges that he is rightfully entitled to said office of county commissioner of said Ada county, and to all the rights, franchises, and emoluments thereof, and has

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been so entitled from and since the first Monday in July, 1870. The said Hunt, further, in and by his said answer, alleges, that on the first Monday, that being the sixth day of June, 1870, a general election was held in said county of Ada, for the election, among other officers, of three county commissioners for said county, for the term of two years, from and after the first Monday in July, 1870.

That at such election, duly held as aforesaid, the defendant Hunt (appellant) was one of three persons receiving the highest number of votes given at said election in said county for said office, and that he duly qualified as such officer, and he submits that on the first Monday in July, 1870, he became, and continually has been, and still is, a commissioner of said county, entitled to hold, use, and exercise said office by virtue of said election. On the part of said defendant Hunt, it is also alleged, that the court below, in permitting the amended complaint to be filed, allowed a new and different action to be commenced, claiming that "the title to a cause shall not be changed in any of its stages," referring to Nash's Pleading and Practice, pages 112 and 113.

What may have been done in the court below, we can not know; we have no information from the record before us, that any objection was made thereto. Suppose the court below did all that is claimed, in the absence of an objection or an exception, must not this court conclude that the defendant so far consented, as to have waived his right now to object thereto? We think such a conclusion just in connection with the power of the district court conferred by sections 40, 45, and 486 of the civil practice act, and under section 68 of the amendment to that law, as found on page 74 of the laws of the fifth session, which authorizes the district court to amend the pleading or proceeding by adding or striking out the name of a party, or by correcting a mistake in the name of a party, or a mistake in any other respect.

The record contains some unnecessary matter; that should be stricken out. The complaint originally filed, and the answer thereto, are no part of the record in this case; be-

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cause a new amended complaint and answer have both been filed. The new and amended complaint not being verified, the answer need not be. A verification of the answer to the amended complaint would be entirely useless; because the said complaint is not verified. (Sec. 51, Civil Practice Act.)

An amended complaint and the answer thereto take the place of the original, and when filed the originals cease to perform any other functions as pleadings. (*Barber v. Reynolds*, 33 Cal. 497; *Gillman v. Cosgrove*, 22 Id. 356.) The amended complaint and the answer thereto form the issues to be tried, and the complaint not being verified, the pleadings on both sides must be sustained by evidence, or the party failing must be defeated. The record in this case fails to inform this court what the proofs were in the court below; it also fails to show any objections or exceptions to the admission of evidence, or that any question was there raised upon any decision of the court, and the only party appealing having succeeded in his demurrer, therefore the demurrer and the decisions thereon can not be considered on this appeal.

Section 294 of the civil practice act makes the written opinions of the court below proper matter to be sent to this court by the clerk of the district court on appeal; but shall this court consider such opinions so far erroneous as to reverse the judgment of the district court when such opinion is unaccompanied by an objection, exception, or settled statement or order of the court making such opinion of the court a part of the record in the case? Without a bill of exceptions, a settled statement, or an order of the court making such papers a part of the record, to be sent to this court as a part of the transcript, this court can not consider errors in the proceedings in the court below, except only such as are a part of the record. (*Scott v. Cook*, 1 Or. 24; *Murray v. Walker*, Id. 341.) We can not reverse the judgment for any error we may find in the opinion of the court below, without objection or exception thereto in that court.

This court should so construe the laws of this territory as to give force and effect to each section and every part there-

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of, if it can possibly be done. Section 180, on page 57 of the laws of the fifth session, among other things provides that, "in the findings filed, the facts found and the conclusions of law shall be separately stated. In such cases no judgment shall be reversed on appeal for want of a finding in writing, at the instance of any party who shall not have requested a finding in writing, and had such request entered in the minutes of the court, nor in cases tried by the court, by commissioner, or referee; nor shall the judgment be reversed on appeal for defects in the findings, unless exceptions be made in the court below for a defect in the finding." Section 206, after providing what shall be put together by the clerk as the judgment-roll, in cases of default, among other things says: "In all other cases the summons, pleadings, verdict of the jury, or finding of the court, commissioner, or referee, all bills of exceptions taken and filed in said action." In order to sustain both of the last-named sections harmonious, it is merely necessary for parties trying causes in the district courts, before such courts, without a jury, to request such courts, before or at the time such cause is finally submitted, to make his findings in writing, and to see that such request is entered in the minutes of the court; when made and filed in the case such party must except to them, or no judgment thereon will be reversed, upon appeal, for any error or defect found in a finding or opinion of a court below, not excepted to; and such a finding should substantially comply with the requirements of the law. This court is of the opinion that there is no such finding on file as the law contemplates.

When section 294 was enacted by the legislature, declaring that "if any written opinion be placed on file in rendering the judgment or making the order in the court below, a copy shall be furnished," doubtless contemplated giving the supreme court the benefit of the wisdom, learning, and ability of the court below, and nothing more. It would hardly be fair to reverse a case on appeal for error found in a voluntary opinion, not objected to, in the court where the cause was tried. This court can not say, from all that appears in this record, that McCarty did not prove everything

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that was stated in the complaint of the plaintiff below; and for aught we can learn from this record, the defendant Hunt may have failed to prove every material allegation in his answer.

For the reasons above stated, the judgment of the court below is affirmed.

**L. B. LINDSAY, PLAINTIFF IN ERROR, v. THE PEOPLE
AND WILLIAM BRYON, DEFENDANTS IN ERROR.**

LAW OF A CASE.—A decision of the supreme court in a given case, even although it be erroneous, becomes the law of the case upon the points involved, and can not be reviewed, altered, or changed upon a subsequent hearing in this court.

ERROR to the district court of the second judicial district, Ada county.

J. Brumback, R. E. Foote, and Milton Kelly, for the plaintiff in error.

J. R. McBride, J. R. Lewis, and H. E. Prickett, for the defendants in error.

Opinion by **WHITSON, J.**; **HOLLISTER, J.**, concurring specially in the judgment. **NOGGLE, C. J.**, dissented.

This cause is brought to this court upon two assignments of error, viz.: 1. The complaint is insufficient in law to maintain the action. No user of the office by either of the claimants is shown by the complaint or either of the answers, and it appears upon the face of the pleadings that the term of the office for which the defendants claimed had not yet commenced at the time of the beginning of the action. 2. The judgment is null and void upon the ground that the trial was had before the finding of facts was made and the judgment rendered by the judge at chambers, and not at any term of the district court.

The action was commenced at the November term, 1870, of the district court of the third judicial district of Idaho territory, in and for the county of Ada, and by stipulation of the parties the cause was continued beyond the term,

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and upon five days' notice, as stipulated, the cause came on to be heard on the twentieth of December, 1870, at which time all the parties to the action appeared and went to trial upon the issues formed by the complaint and answers of the two defendants. The defendant Lindsay, however, moved to have the action dismissed, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, in this, that it contains no allegation that either of said defendants has usurped, intruded into, or unlawfully holds or exercises the said office of sheriff of Ada county, Idaho territory. At what particular stage of the proceedings this motion was made does not appear, except that it was made and denied on the twentieth of December, 1870. The complaint discloses that the term for which the defendants claimed to have been elected would commence on the first Monday of January following. The answers of the defendants admit all that is alleged in the complaint, besides alleging the grounds upon which they claim to be entitled.

Neither claims any right to the office before the first Monday in January, nor is such an allegation made against them. The judgment of the court was as follows: viz.:

“On the twentieth day of December, 1870, this cause came on to be heard, as per agreement of parties, upon notice duly given, before Hon. J. R. Lewis, judge of the third judicial district of Idaho territory, at chambers, in Boise city, Ada county, Idaho territory, on the pleadings and evidence. The People appeared by Jos. W. Huston, Esq., United States district attorney. The defendant, L. B. Lindsay, appeared by Messrs. Rosborough, Brumback, Heed, and Miller, and the defendant, Wm. Bryon, by John R. McBride and H. E. Prickett, and the evidence, pleadings, proofs, and exhibits having been heard and considered, and the findings of fact and conclusions of law of said judge having been made and filed, whereby it is decided that the defendant, Wm. Bryon, at the general election held in and for said county, on the sixth day of June, A. D. 1870, received for the office of sheriff of said county of Ada a majority of all the legal votes cast for said office of sheriff,

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and was duly elected to said office of sheriff of Ada county, for the term of two years from and after the second day of January, 1871. Now, therefore, it is hereby adjudged that the said Wm. Bryon was duly elected to said office of sheriff of Ada county, Idaho territory, at the election held in said county, on the sixth day of June, 1870, for the term of two years from and after the second day of January, 1871; and that the right to said office for said term be and the same is hereby awarded to him, the said Wm. Bryon.

“It is further adjudged that the said defendant, L. B. Lindsay, was not elected to said office at said election, and that he be precluded therefrom.”

While in some instances this court might conclude that the defects of the complaints were cured by the evidence in this case, we are precluded from any such conclusion, because the judgment in the case discloses that the judge only found that on the second of January, a time not yet arrived, Wm. Bryon would be entitled to the office, and that L. B. Lindsay would not. We can not presume that the judge found Lindsay intruding into an office not yet even claimed by him, and the very wording of the judge is, that Lindsay be precluded, not excluded, therefrom.

It is, however, claimed that section 279 of the civil practice act was intended to try the right to an office before the actual intrusion into it. That section is one of seven under the title of “actions for the usurpation of an office.” The first section under that title provides for an action upon the information of the district attorney, or the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military. The second section of the act provides that, in addition to the statement of intrusion, it may also be set forth in the complaint who is rightly entitled to the office, and in such case, upon proof by affidavit, that the usurper has received fees or emoluments, he may be arrested and held to bail as in other civil actions. The third section provides that judgment may be rendered upon the right of the defendant, and also upon the right of the party alleged to be entitled, or only upon the right of the defendant, as

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justice shall require. The fourth section of the act provides, that if judgment be rendered in favor of the person alleged to be entitled, he shall be entitled after taking the oath of office, and executing the official bond, to take upon himself the duties of the office. The fifth section of the act provides, that if judgment be rendered in favor of the person alleged to be entitled, he may recover by action the damages sustained by reason of the usurpation. The sixth section of the act provides, and this is the section upon which counsel for Bryon rely, that "where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise."

It is claimed that two persons can not intrude into the same office at the same time, and therefore that the section just cited must mean that the action can be begun and tried in advance. It is undoubtedly true that two persons can not, one *de facto* and the other *de jure*, be in possession of the same office, at the same time, where the office is of such a character that the law only provides for one incumbent; but does it necessarily follow that this law was made expressly for this case, or one similar to it? Might it not have been intended for that class of cases where two or more persons are required by law to fill the office? Suppose that at the next election three new county commissioners should be elected, and the present incumbents should refuse to give up to the newly elected officers, would not this section be the very one which the district attorney would go to for authority to bring his action? But the answer to this is, that the statute provides that the singular number shall include the plural and the plural the singular, and therefore it might be brought under the provisions of section 1 of the act.

This course of reasoning would just as well allow A. to sue B. and C. together, where he had a separate cause of action only against each. Each county commissioner of Ada county has a separate and distinct title to his office, and his right does not depend, so far as his election is concerned, on the title of the other two, although the office is

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joint and requires all three to fill it. Without the aid of this section, if these commissioners should attempt to usurp the office, separate actions would have to be commenced against each of them to try their respective titles, and yet this could not be done under this section until there was an actual user.

Section 7 of the act seems to answer the whole question, which provides that “when a defendant against whom such action has been brought is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise, or privilege, judgment shall be rendered that such defendant shall be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars.” The section just cited provides that in such action, if the defendant is adjudged guilty, he may be fined and shall be excluded from the office. If there are two classes of actions provided for in the act, it is impossible to so determine from anything which appears in the first five sections of the act, and the seventh section certainly precludes any such construction.

Section 40 of an act relative to elections is thought to throw some light on the subject by providing that the manner of contesting elections in that act shall not impair in any way the right of any person to contest any election in the manner otherwise provided by statute. What is the manner otherwise provided by statute? Why, the old common law remedy, or rather an action which has taken its place, by an information in the nature of *quo warranto*, as provided for in section 274, and the six sections following under which an election can be contested, but not until there has been an actual user.

If section 279 is intended to try cases like the one at bar, then the legislatures of New York, California, Oregon, and Idaho have been very stupid. All three of those states have almost the identical act with ours in relation to the usurpation of an office or franchise, and in New York and California, under the title of “actions for the usurpations of an office,” there is a section identical with ours, section 279. In each

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of those states the legislature has provided a way to contest elections independent and outside of the action for the usurpation of an office. Our legislature attempted to pass a law for the contesting of elections, but conferred the power upon a court which this court has decided could not have any common law jurisdiction conferred. Each of those states has, then, undertaken to provide for contesting elections in a separate statute from the one providing for the excluding of an intruder.

It is unreasonable to suppose that New York, which has the most complete code of practice of any state in the Union, would make complete and ample provision for contesting an election, and then place a small, and, when placed alone, a senseless section of about three lines under a title and between the sections of a law to which it has no reference and bears no relation. It will not be contended with any seriousness that actions in the nature of *quo warranto* can be sustained in cases where there is no user. It has been held in New York, that “an information does not lie against persons for merely claiming a corporate franchise, and if the information charge them with claiming without authority, and exercising the franchises of a corporation, etc., a plea denying the user is sufficient.

There is no such action known to the common law as contesting an election before user, and no authority has been conferred on the district courts by statute for trying the title, except by an action which has taken the place of the old action of *quo warranto*.

It is claimed, however, that this case is *res judicata*, and that it has been decided, so far as the jurisdiction of the court was involved in the decision of the motion, to quash the certiorari brought to this court at the last term.

Justice Lewis tried this case originally, and at the last term a writ of certiorari was allowed to bring the case into this court, and upon a motion to quash the writ, Justice Lewis delivered the opinion of the court. The judge no doubt felt a very natural desire to have the proceedings below sustained. He went into a very elaborate and unnecessary opinion, in which I concurred generally, as

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appears of record, when in fact I ought not to have concurred, as I only intended so to do except as to the judgment, and it is not now necessary for me to express my opinion as to all the questions therein discussed. It has become the law so far as these questions have been adjudicated. A decision then that the court did have jurisdiction of the case was as binding upon the parties as the decision of this court would now be that it did not. I can not go back of that decision without stultifying myself, however much I might desire, because it has become the law of the case as much as any statute could make it.

The court in that case said: "The matter in dispute in this case was the office of sheriff." Both Lindsay and Bryon claimed to be entitled to the office, and the question to be determined was the respective rights of the parties to such office. It is claimed by Lindsay that the court below erred because it was not alleged in the complaint that one of the defendants had usurped said office; that the court or judge had no jurisdiction of the subject-matter. Section 279 of the civil practice act provides that when several persons claim to be entitled to an office, an action may be brought against all of such persons to try their respective rights.

Now it is clear that but one person can be in the actual possession of an office; hence, if the view of Lindsay be correct, section 279 has no force, because several persons can not at the same time usurp an office. But be this as it may, there is no doubt but that the court below had jurisdiction of the subject-matter.

However much I might be disposed to reverse this case, had it not before been in this court, I think that the parties secured, in the case of the certiorari, a decision upon the jurisdiction of the court over the subject-matter, which is conclusive in all future stages of the same case. The question of the right of the judge to try the case at chambers was not decided in the certiorari case, and that question is properly here for review.

The parties stipulated to try the case in that way; and while it is true that no consent will give jurisdiction of the

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subject-matter, the court, under the decision above cited, needed no jurisdiction of the subject-matter, and therefore the consent given was not of jurisdiction of the subject-matter, but of the parties, and of the manner and time of trying the case.

The great mistake made by Lindsay, was in bringing his certiorari, in the first instance, and getting an adjudication upon the only good point in his case, and the very one upon which he asks this court to adjudicate differently from what it has already done. It may be insisted, that because he was told in that case to bring his case here upon a writ of error, therefore it was not intended to pass upon those questions. By inspection of the decision, it will be seen that the court did not pass upon the chambers jurisdiction, and therefore a writ of error was necessary to test that question. So far as the other question is concerned, while the court passed upon it, it stated that, conceding that the court had exceeded its jurisdiction, the proper mode of getting here was by writ of error.

For these reasons, however erroneous the judgment, I think it will have to be affirmed.

Judgment affirmed.

HOLLISTER, J., specially concurring in the judgment:

I concur with Justice Whitson in the opinion that the judgment of the district court should be affirmed, but for reasons which differ from those from which his conclusions are drawn. It has been urged that the judge of the district court who tried this case at chambers, erred in counting the ballots cast for the respective parties, with a view to determine therefrom which was duly elected, and this proceeding has been animadverted upon with considerable severity; but as the court is unanimous in the opinion that the record does not present this question, no consideration can properly be given to it, and it need not therefore be discussed.

The only questions presented by the record are: 1. Whether the court had jurisdiction of the subject-matter; 2. Whether the complaint states facts sufficient to consti-

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tute a cause of action. To both of these questions my answer must be in the affirmative.

Jurisdiction of a subject-matter, in its general sense, is defined to be a power constitutionally conferred upon a judge or magistrate to take cognizance of and decide causes according to law, and to carry his sentence into execution. (6 Pet. 591; 9 Johns 239.) It is the law which gives jurisdiction; the consent of parties can not therefore confer it in a matter which the law excludes. (1 Nott & M. 192; 3 McCord, 280; Breese, 32.) The district courts of this territory are courts of original general jurisdiction, made such by the organic act, and may take cognizance of all cases in chancery, as well as under the common law, and of such as are provided for by the territorial legislature. It can not be doubted that these courts are clothed with authority to try the title to an office. This authority is expressly given in chapter 4 of the civil practice act, and is supported by the case of the *People v. Pease*, 27 N. Y. 45, decided by the court of appeals of the state of New York in 1863. The object of the statute evidently is to test the right of any one or more persons who intrude into or unlawfully hold or exercise a public office as against the people, or another lawfully entitled to it, as well as the respective rights of several persons claiming to be entitled to it. The statute is a substitute for the common law writ of *quo warranto*, which was in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim in order to determine the right, but the process under it, unlike the proceeding by *quo warranto*, is a civil process.

It is urged with great earnest, notwithstanding, that because the complaint shows no user, the court had no jurisdiction of the subject-matter, and that the judgment is *coram non judice*, and therefore void. I must confess that this is a novel mode of determining a question of this character. As has been shown, jurisdiction of a subject-matter is conferred by law. Neither consent of parties, the efflux of time, nor the happening of any contingency will give it; and yet

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it is seriously urged, that because no usurpation or user of the office is alleged, the court exceeded its jurisdiction in entertaining the action. Numerous supposed cases have been put to prove the soundness of this position as instances. "As well might a court say, that because justices of the peace have by law the exclusive right to hear, try, and determine all common assaults and batteries, that if a person is arrested and brought before a justice of the peace, charged with an offense not committed, but with an assault that he may possibly commit two months hence; that such justice may legally retain such a case; that he should not dismiss the case for want of jurisdiction. Can it be said, because justices of the peace have jurisdiction to try assaults and batteries, that for that reason they have jurisdiction of the subject-matter before an offense has been committed? And as well might the court determine that because justices of the peace have the exclusive right to try and determine cases of forcible entry and detainer, that such justices have jurisdiction of the subject-matter of such actions before an offense has been committed—before force has been used or entry into the premises been made, or the premises have been unlawfully detained, and that all this is not an excess of jurisdiction."

In these hypothetical cases it is conceded that, by law, the justices had authority to try assaults and batteries and forcible entry and detainer; and yet, because some person, ignorant of the facts of the case or the law, had been unwise enough to bring the action before the cause of it had accrued, the court had no jurisdiction of the subject-matter.

These illustrations serve to show what has been apparent throughout the discussion of this question, that those who make the objection have confounded the distinction between the *jurisdiction* of a court and its erroneous *exercise*.

The logic of the argument is simply this: "It is true jurisdiction has been given to try the respective rights of the parties to the office; yet, because the time for bringing the action had not arrived, the court had no jurisdiction of the subject-matter," thus mistaking its inability to exercise

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it in the particular case for the want of it. This objection is of no more force than if urged to an action in ejectment commenced in the district court by the owner of certain premises leased to a tenant before the demise expired, or on a promissory note before its maturity, in neither of which can it be said that the court had no jurisdiction of the subject-matter. In the cases supposed, if the actions were sustained, the judgments, though erroneous, would be binding upon the parties unless reversed by a higher tribunal, and could be enforced by execution without rendering the opposite parties, the justices, or the officer who executes the process, liable as trespassers; nor could they be attacked collaterally in any other action. It is contended that the judge of the district court had no authority to try the case at chambers, and that in doing so he exceeded his powers, and his judgment is therefore void.

This objection, as well as that to the jurisdiction of the district court, is singularly at variance with the whole course of proceeding on the part of those who urge it. While pressing it, the court at the same time is asked to examine the entire record, and to determine whether there was not error committed in the finding of facts. In other words, the court should look into the merits of the case, which can only be done when possessing jurisdiction. If the objection to the jurisdiction of the district court is not well taken, that to the jurisdiction of the judge at chambers is not tenable. Numerous authorities, both English and American, have been cited in support of the position that independently of a statute a judge at chambers has authority to hear and determine a case of this character, and they are not without great force, but it is not necessary to consider them, inasmuch as jurisdiction has been expressly conferred by the legislature in section 617 of the act of January 15, 1869, which provides among other things that district judges at chambers may try and determine writs of *quo warranto*.

The parties having entered into a stipulation that the case might be heard at chambers, it is difficult to perceive the propriety of interposing such an objection in this court for the

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first time. Had counsel any just reason to believe that the judge had no authority to try the case at chambers, every rule of correct practice demanded that no agreement should be entered into, the effect of which would be to take it out of the proper jurisdiction and send it to a tribunal without authority to hear it. It may not be within the limits of judicial propriety to say that such a proceeding was a fraud upon the court, and merits the severest censure; but the observation may be permitted that the effect of it, if successful, would have been to discontinue the suit by indirection, and thus baffle the ends of justice. Legal ethics are not slow to place the seal of disapprobation upon a practice of this character.

I will now proceed to the other question, "that the complaint does not state facts sufficient to constitute a cause of action." The solution of this question depends upon the proper construction to be given to the statute under which the action is brought.

Section 274 is as follows: "An action may be brought by the district attorney in the name of the people of the United States, and of the territory of Idaho, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this territory. And it shall be the duty of the district attorney to bring the action whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor." Section 275 provides, that whenever such action is brought, the district attorney, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by the judge of the supreme court, or a district judge, for the arrest of the defendant, and holding him to bail; and thereupon he

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may be arrested, and held to bail in the same manner and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest. Section 279: "When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise."

It is claimed, that though this section gives the right of action against all who claim to be entitled to the same office, yet the complaint must allege a user, and inasmuch as it contains no such averment, but on the contrary shows that both the contestants claim to be entitled to an office, the term of which did not commence until a day subsequent to the suit, it shows no right of action in behalf of the people against either of them. Numerous adjudged cases have been cited in support of this position, the most important of which is that of *The People v. Thompson et al.*, 16 Wend. 656; but it is to be observed, that they were governed by statutes containing provisions almost precisely like those in section 274 of our act, and entirely different from the cases provided for in section 279. As the case in Wendell has been the one upon the authority of which the most reliance has been placed by those who urge the objection, I will proceed to quote from it all that is material to the question. In that case, the attorney-general filed an information in the nature of a *quo warranto*, charging the defendants with claiming, using, and exercising the liberties, privileges, and franchise of a body politic and corporate, etc. To that portion of the information charging the defendants with claiming and exercising the liberties, etc., they answered that they never used such liberties, etc. The attorney-general demurred to the answer, for the cause that it did not meet the charge of a claim on the part of the defendants to be a body politic, and the defendants joined in the demurrer.

"By the Court, Nelson, C. J. The demurrer of the attorney-general to so much of the plea as professes to answer the first count of the information, raises the question whether, under the revised statutes, authorizing an infor-

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mation in the nature of a *quo warranto*, the defendants are bound to answer, specifically, the averment that they claim to use and exercise a franchise, etc. If they are obliged to answer a mere claim to exercise corporate privileges, disconnected from any allegation of user, then, undoubtedly, the plea is bad, for it contains only a denial of the user. The defendants, if so bound to answer, should have set forth title, or disclaimed. The language of the statute, so far as concerns this case, is as follows: 'An information in the nature of a *quo warranto*, may be filed, etc., where any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within the state,' etc." The learned judge then proceeds to say: "The first clause seems obviously to require something beyond a claim to an office, or to the exercise of a franchise, to authorize the institution of the proceeding. To usurp, intrude into, or unlawfully hold or exercise an office or franchise, means to take possession of the office or franchise without right, or unlawfully to hold or use the same after possession has been rightfully or wrongfully acquired. The words of the statute were taken from 9 Anne, ch. 20, sec. 4, under which act it has been repeatedly determined there must be a user or possession of the office or franchise, and that a mere claim is insufficient." He then refers with approval to the case of *Rex v. Ponsonby*, which originated in the king's bench in Ireland (the statute being a copy of 9 Anne), and it came before the king's bench on error, where the judgment was reversed, which reversal was afterwards sustained by the house of lords. The information was filed against seven persons, charging them with usurping the office of free burgesses of the corporation of Newton. The question whether it would lie against two of them, who, though elected, had not been admitted or sworn in, came up in the pleadings.

Chief Justice Rider, who delivered the opinion of the court in error, stated one question to be, "whether it, the information, lies against the two now acting burgesses;" and adds: "It clearly can not, upon this ground, that under the words of the statute there must be usurpation, in-

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trusion, or unlawful holding. Now, claiming," he says, "which only appears against them, can by no construction be taken to amount to any of these, and it would be strange to imagine the statute intended to prevent the asserting or claiming a right." If, as Chief Justice Rider says, claiming an office does not mean a usurpation, intrusion, or unlawful holding, it is difficult to understand why, under section 279, such an averment should be required in the complaint, as the action under it clearly lies upon a mere claim. At common law a writ of *quo warranto* runs against him who claims or usurps an office. (3 Bl. Com. 262.) The statute of Anne, and the New York statute under which the cases referred to arose, differ from the common law, inasmuch as under them an action will not lie against a mere claimant to an office, while at common law it could be maintained against him. If there had been no further provision in our statute than what is found in section 274 (this being substantially like the statute of Anne, and the revised statute of New York), the cases cited upon this point as authorities would probably have been decisive, but they can not be considered as applicable to actions brought under section 279, which is an enlargement of those statutes, and embraces, as did the common law, cases where only a claim to an office is set up. A careful scrutiny of the case in Wendell and the one in king's bench, there cited, will satisfy any one that they were decided upon purely statutory grounds, and inasmuch as the statutes gave no right of action against one who only claimed an office, an allegation in an information of only a claim was not sufficient to maintain it. There can be no doubt that under our statute the people have the same right to inquire by what authority a person claims the right to an office as the crown had at common law, and there can be as little doubt that this action was properly brought for the purpose.

I might rest my argument on this point just here, without going into any further reasons to support it, but it may not be considered altogether unnecessary or unprofitable to examine the statute with a little closer attention to its several provisions, in order to arrive at a more satisfactory un-

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derstanding of its true meaning. It may be assumed, as a well-settled principle of interpretation, that such construction shall be given to a statute as shall give effect to each portion of it, and that all its provisions shall be taken together, in ascertaining the intentions of the law-giver. Guided by this rule, there can be no difficulty in arriving at the conclusion, that the legislature intended to provide, in sections 274 and 279, for two distinct classes of cases, one of which covers the case of a usurpation, etc., and the other that of a mere claim to an office.

It will be seen that, under section 274, one or more persons may be proceeded against where they usurp, intrude into, or unlawfully hold or exercise an office or franchise; and the district attorney, under section 275, may, in addition, also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto. Under section 279 the proceeding may be had against all the claimants, merely on their claiming to be entitled to the office, in order to try which of them has the lawful right to it; and in such proceeding it is not necessary for the district attorney to set forth the name of the person rightfully entitled to it. When the action is brought under section 274, and proofs are made that the defendant has received fees or emoluments belonging to the office, he may be arrested and held to bail for the security of the person lawfully entitled to the office.

When suit is brought under section 279, no such proofs are required, and the defendants can not be arrested and held to bail, because the district attorney is not required to state who is lawfully entitled to the office, nor to set forth his title. The law in such cases presupposes that there has been no user by either of the parties proceeded against. The object of the section is to settle conflicting claims to an office before a user; and to carry it into effect, the claimants are required by the people, as under the writ of *quo warranto*, to show by what authority they support their respective claims. Under section 274, the action is against a wrong-doer, against one who usurps or intrudes into an office, or being in it, unlawfully holds or exercises it against

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the rights of the people or of another lawfully entitled to it; and if against the latter, the defendant is liable to him for any fees or emoluments he has received while exercising the office, and in both cases, in addition, to a fine not exceeding five thousand dollars, as a penalty, to be paid into the public treasury. Under this section the judgment may be against the defendant and in favor of the claimant, or it may be against the defendant only; and in the latter case the right of the contesting claimant is not determined; while under section 279 the judgment must determine the rights of all the claimants, and no damages can be awarded or fine imposed against either; one action settles the respective rights of all, and the judgment is conclusive. It is a mere election contest, to be settled, as under the common law proceeding, by *quo warranto*, in advance of taking possession of the office by either of the contestants upon a mere claim of right thereto. But it is said, and in this view Justice Whitson concurs, that section 279 is designed to meet a case for which section 274 has not provided, as, for instance, the unlawful holding of an office by three county commissioners against the claims of those who have been elected to succeed them.

I am prepared to concede that under section 274, a joint action can not be brought against all three of the county commissioners to try by what authority they hold the office against the claims of their successors, inasmuch as the office is not a joint one, and the rights of each may depend upon entirely different questions; but while this is so, section 279 does not meet the case. This is evident from the language of the section, and besides, the difficulty of trying the right to an office held by two or more persons, and by different titles in a joint action, which would be met with in case the suit should be brought under section 274, would necessarily arise, when brought under this section. If the language of the section had been, "when several persons claim to exercise the office by different rights," it would have covered the supposed case.

In the case of the county commissioners, it would be an extraordinary circumstance if they were each elected by

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the same majorities and the same votes, and it would only be in such cases that their claims to the office could be tried in a joint action. It is not to be supposed that the legislature contemplated such an extreme or improbable case, and that this law was designed to meet it. It may be asked, if this section does not give the right of action in the supposed case, how can questions of this character be judicially determined? The answer is obvious. The respective rights of the incumbents to hold the office may be tried in separate actions under section 274. But it is claimed that where several persons claim to be entitled to the same office, as under section 279, it must be held to be to an office in *presenti*, one of which the successful claimant can take possession, under and by virtue of the judgment in his favor, at once. This is a very narrow and technical view of its meaning. Suppose this action had not been brought until Lindsay had taken possession and was exercising the duties of the office, and that judgment had been in favor of Bryon, can it be contended that he would be immediately entitled to take possession of it? He must first get his commission, give bond, and take the oath of office; in other words, he must comply with the requirements of the law, before he can enter upon the office and undertake its duties. The section means nothing more, than if judgment is given in favor of one of the claimants, he shall be entitled to the office when his term commences; and when he shall have complied with the law in other respects, a judgment in his favor would be subject to the conditions prescribed by law, and would not *ex proprio vigore* operate to invest him with the office *eo instanti*, were there any other requirements of the law to be observed.

Again, it is claimed that the act under consideration does not give this right of action, because the legislature has provided another mode of contesting elections, in the act passed December 17, 1864. It is true this act has made such provision; and though it is contended that the probate court had no authority (as therein provided) under the organic act to entertain jurisdiction, yet I am not disposed to place my answer upon that ground.

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The act under which this suit was brought, was passed on the fifteenth of December, 1864, and was the only one then in force, under which an election contest could be had. Had there been no saving clause or provision in the act of December 17, it might have been contended, with some show of reason, that it was not the intention of the legislature to preserve the power in the district courts to decide such contests; but section 40 expressly provides that the act shall not be construed so as to impair in any way the right of any person to contest any election in the manner otherwise provided by statute. This must refer to the statute under which this action is brought, for, as I have said, this was the only statute on the subject in force, when the latter act was passed. Great stress has been laid upon the fact, that the act in question has provided that judgment of exclusion shall be given against the defendant, if found guilty; and that because, as is claimed, no such judgment can be pronounced in this case, the action is not well brought. It may be answered, that such a position is not tenable, because the conclusion drawn from the premises is not sound.

The term "exclude," used in the act, does not mean *ouster* from, or *dispossession of*, an office, but, that if a party is guilty, he shall be debarred, or precluded, or hindered from entering into or holding it; and the omission in the statute of a case where only a *claim* to an office is adjudged to be unlawful, does not prevent its application to the latter, by fair construction. The judgment of the district court, that Lindsay be "precluded" from the office, is not therefore obnoxious to the criticisms that have been indulged in by those who object to its form, as not being authorized by the statute. The whole argument of counsel, who seek a reversal of the judgment on the ground that the complaint is not sufficient, is nothing more or less than this, that in every conceivable action which the statute authorizes, a user must be alleged, or it must fail. If this view be correct, for what purpose, may I ask, was section 279 enacted? If it is necessary to make the same allegations in a complaint, in this respect, when the action is brought

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under this section or under section 274, then the conclusion is inevitable, that the section is meaningless, for the latter covers every case that can arise under the other section.

It is said that the complaint does not show that Bryon and Lindsay claimed to be entitled to the office, but it shows that in about two months from that time, that is, on the first Monday in January, 1871, they may claim that they will be entitled to the possession of said office. What the complaint does allege is, "that on the sixth day of June, 1870, at a general election held in the county of Ada of this territory, pursuant to the statute, for the election, among other officers, of a sheriff of said county for the term of two years from the first Monday of January, 1871, the said L. B. Lindsay and William Bryon were each candidates for said office, and were each voted for by the qualified electors of said county for the said office, for the said term. That the number of votes received by each of said defendants was nearly equal, and each of the defendants claims to have received the highest number of votes given and cast at said election by the legal voters of said county for said office for the term aforesaid, and to be entitled to the said office of sheriff of said county for the said term of two years from and after the first Monday in January, A. D. 1871." It is quite obvious that this is not a mere allegation, that on the first Monday in January they (the defendants) may claim that they will be entitled to the possession of the office.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

JANUARY TERM, 1873.

PRESENT:

HON. DAVID NOGGLE, CHIEF JUSTICE.
HON. W. C. WHITSON, } JUSTICES.
HON. M. E. HOLLISTER, }

JOSEPH FORSYTHE, RESPONDENT, *v.* DAVID RICHARDSON, APPELLANT.

STATEMENT.—A statement made on a motion for a new trial may be considered on an appeal from the judgment, for the purpose of determining whether any errors in law were committed by the court below in the progress of the trial.

EXCEPTIONS—STATEMENT.—If it does not appear from the statement made on a motion for a new trial, that any exceptions were taken at the trial to any ruling of the court, the statement is useless on an appeal from the judgment.

TOWN SITE ACT—EQUITY—ACTION.—An action under the town site act to settle the rights of parties to enter lots in such town site, assimilates more to a suit in equity to quiet title than to any other form of action.

DEFINITION—JUDGMENT.—Judgment is a general term for adjudications of a court, and, in its broadest sense, includes decrees.

PARTIES.—In an action to settle rights under the town site act, the mayor of the city is not a necessary party.

PUBLIC LANDS—POSSESSION.—If the public lands of the United States are claimed by virtue of possession alone, the claimant is bound to take such precautionary steps as will advise all the world of his rights.

Argument for Respondent.

APPEAL from the district court of the second judicial district, Ada county.

Milton Kelly, J. R. McBride, and Alanson Smith, for the appellants:

On the question of occupancy, we cite the following authorities: 2 Bl. Com. 3; Id. 8; 2 Kent's Com. 318, 319, 325, 347, 356. As to open and notorious possession by a pre-emption occupant, 4 Wall. 332. As to personal residence, *Barstow v. Newman et al.*, 34 Cal. 90.

Prickett & Hasbrouck, for the respondent:

The appeal from the order refusing a new trial having been dismissed or waived, we submit that the statement made upon that motion can not be used upon the appeal from the judgment, except for the purpose of considering alleged errors of law occurring at the trial. (*Casgrave v. Howland*, 24 Cal. 457.) We do not claim that the statement should be entirely disregarded in every case like the present, but that it can only be used in reviewing the action of the court below so far as it relates to errors in law affecting the judgment, and which are assigned as reasons for a reversal or modification of the judgment, for upon an appeal from a judgment the supreme court will look at the evidence so far only as to see the relevancy of the exceptions taken during the trial. (*Carpentier v. Williamson*, 25 Id. 154.)

The findings of the court can not be reviewed on an appeal from a judgment. (*Racouillat v. Rene*, 32 Cal. 450; *Gagliardo v. Hoberlin*, 18 Id. 394.) The appellate court will not review the facts of the case unless an assignment of error shows that the court below refused an application for a new trial made on the ground that the verdict or decision was contrary to evidence, and that only on appeal from the refusal to grant a new trial. (*Smith v. Phelps*, 2 Cal. 121; *Griswold v. Sharpe*, Id. 23; *Whitman v. Sutter*, 3 Id. 179; *Ingraham v. Gildermester*, 2 Id. 483; *Brown v. Tolles*, 7 Id. 398; *Reihn v. Bogardus*, 13 Id. 73; *Liening v. Gould*, Id. 598; *Higher v. Peck*, 30 Id. 280.)

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The office of a statement is to bring into the record those matters only which arise during the trial, and constitute the basis of a motion, and a specification of the particular grounds of error is the essential element of a statement, and if no specifications are made, the statement will be disregarded. (*Hutton v. Reed*, 25 Cal. 483; *Crowther v. Rowlandson*, 27 Id. 385; *Moore v. Murdock*, 26 Id. 524; *Love v. S. N. L. W. & M. Co.*, 32 Id. 639.) There being no errors, either of fact or in law, specified in the statement, this case is to be reviewed on the judgment roll alone, in which there is no error. There were no exceptions taken during the trial.

The exceptions to the findings of fact are not properly before the court. They are not authorized by the statute. It is for defect in the findings only that an exception can be taken. (5th Session Laws, 75.)

WHITSON, J., delivered the opinion. HOLLISTER, J., concurred. NOGGLE, C. J., dissented.

In this case it is conceded that we can only consider the appeal taken from the final judgment—the appeal from the order overruling a new trial not having been taken in time. We have heretofore decided that we might consider the statement made on a motion for a new trial for the purpose of considering any errors alleged to have been committed by the court below in the progress of the trial, even though we might not be able to review the statement on the appeal from the order refusing a new trial. (*Towdy v. Ellis*, 22 Cal. 650.)

Upon an inspection of the statement, we fail to find that any exceptions were taken during the progress of the trial, to any ruling of the court; and, therefore, in this case, the statement becomes useless. We are consequently reduced to the consideration of the complaint, answer, and findings of the court, in order to determine whether or not they will support the judgment.

This suit was brought under the provisions of an act of the legislative assembly of the territory entitled “an act to provide for the disposal of lands in Boise city, Ada county,

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Idaho territory, pursuant to the several acts of congress in such cases made and provided. This case assimilates more to a suit in equity to quiet title, than to any other form of action either in law or equity. It is urged that the act above referred to requires the conflicting claims to be determined by a final judgment, and that the court decreed the property in question to the plaintiff. This is true, but the court did move it "ordered, adjudged, and decreed." Judgment is a general term, and may be applied to decrees. It being the more general term includes decrees as well; therefore, when the legislature used the term "final judgment," it must be taken in the broadest sense of that term.

It is urged that the mayor ought to have been made a party. We think not, because the law requires that he should receive a certified copy of the judgment, upon which he should execute the deed. This provision was evidently made upon the hypothesis that the mayor would be a stranger to the proceedings in court, and could be informed of the result of the determination only in the manner provided. Even if it be necessary that the mayor be made a party, no question of that kind was raised in the court below, either by demurrer or answer, and it is too late to raise that point here for the first time. The remaining objection to this judgment is, that it is not supported by the findings.

It is a matter of some doubt, whether or not this court can consider findings made solely on the motion of the court. No findings were asked in this case by either party. But, waiving that question, we see no reason for reversing the judgment, on the ground that the findings will not support it.

It appears that the plaintiff had been in possession for a long time before any application was made by the defendant to the mayor for a deed, and that such possession was *bona fide* and without interruption. This was *prima facie* evidence of title, and it devolved upon the defendant to rebut this evidence. We discover nothing in the findings of the court which rebuts this *prima facie* case of the plaintiff; but, on the contrary, find that defendant claimed nothing in the conversation with plaintiff but the house. The find-

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ings certainly disclose all the facts to entitle plaintiff to the judgment which the court gave, and they disclose nothing which would entitle defendant to a deed even if plaintiff were not a contestant. It is urged that Southall and Scranton never had any right to the lot in question, and therefore that plaintiff could have deraigned no equitable title from them. This might be admitted without any damage to the plaintiff.

So far as the rights between plaintiff and defendant are concerned, it makes but little difference; both claim their rights from the same source—the plaintiff the right to the lot, and the defendant the right to build the cabin on it. The plaintiff has occupied the lot for several years, and during that time has made valuable improvements on it. He bought out the rights of all those who claimed any right or title in either the cabin or lot, and up to the time when he was first made acquainted with the fact that defendant made any claim to either lot or cabin, he was a *bona fide* purchaser of all interests in both, as also an occupant and improver of the lot. The plaintiff had no means of knowing from the public records of any claim to the lot, and it does not appear that he has ever had any intimation of the defendant's claim by which a reasonable man would be put upon inquiry. If the public lands of the United States are claimed by virtue of the possession alone, those claiming are bound to take such precautionary steps as will advise all the world of their rights. If the defendant placed in charge of his rights one who was untrue to his trust, that is his misfortune, and we do not think the plaintiff ought to lose valuable rights thereby. The defendant ought at all events to have embraced the very first opportunity to inform the plaintiff of his claim to the lot. Instead of this, we find that in the conversation between plaintiff and defendant, which was the first knowledge plaintiff had of any claim by defendant, defendant only claimed the cabin.

The court, in its findings, says:

“That from the proofs, it does not appear, that the plaintiff had any knowledge before his purchase and occu-

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pancy of the premises, that the defendant ever had or claimed any title or interest thereon. Nor until May or June, 1868, was he apprised that defendant claimed any such interest. I find that in a conversation at the latter period between plaintiff and defendant, the latter claimed to be the owner of the cabin, and this was the first knowledge plaintiff had of any interest which defendant had or claimed thereto. I further find that at said time, and during said conversation, the plaintiff claimed that he was the owner, as he had purchased it himself, and that since said conversation defendant has never taken any steps, legal or otherwise, to assert his rights to the same, until the time when he filed his application with the mayor for a deed. I find in this conversation that the claim related only to the cabin, and not to the lot in question, and that in such conversation nothing was said by defendant, by which the plaintiff was apprised that defendant claimed to have any interest in the lot." This ought, as it undoubtedly does, estop the defendant from claiming any interest in the lot.

Any other rule would allow the grossest frauds to be practiced upon those who have, in good faith, entered upon the public lands of the United States, and improved them, as it would allow designing persons to step in at any moment and reap the reward of another's toil, when that other had no means by which he might determine the claims of those who might be willing to allow him to be misled, when no amount of diligence could inform him of adverse claimants. The plaintiff had a right to presume that those claiming and in possession were the owners, and in the absence of any record of defendant's claim by which plaintiff or any one else could be advised, it was defendant's duty to see that the innocent were not misled by his own agents.

Exceptions were taken to the findings as not being supported by the evidence, but as we can go only to the statement for the purpose of detecting errors of law committed by the court in the trial of the case, and not for the purpose of determining whether or not the court arrived at the wrong conclusion on matters of fact, those exceptions are immaterial, and can not cut any figure in this case.

Judgment must be affirmed.

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G. W. C. MCCOY ET AL., RESPONDENTS, v. J. B. OLDHAM, APPELLANT.

APPEAL—UNDERTAKING ON APPEAL.—An undertaking on appeal from a judgment in the sum required by law upon a single appeal, does not make effectual an appeal from an order refusing a new trial, although taken at the same time and by the same notice.

APPEAL—STATEMENT—BILL OF EXCEPTIONS—PRACTICE.—Upon an appeal from a judgment without a statement or bill of exceptions, nothing can be considered except the judgment roll; and if no error appear therein, the judgment will be affirmed.

A. Heed, for the appellant.

J. Brumback, for the respondents.

NOGGLE, C. J., delivered the opinion. WHITSON and HOLLISTER, JJ., concurred in the judgment.

This action was originally commenced by the plaintiff, McCoy, a workman employed by Mullany & Binns, to work on the defendant's building in Boise City, Ada county, Idaho territory, to enforce a lien upon such building for his said work. McCoy was demurred out of court, but before that had been done, Mullany & Binns, original contractors, appeared and filed their claims as mechanic lien-holders. It may be said that this is an equity case. It was tried before the court without a jury; the testimony, by the transcript, appears to have been taken in open court, as in a law case, tried by the court without objection. After the trial a statement was made and settled, on which to move for a new trial, the same as in a law case.

A motion for a new trial was made, and overruled by the court. No other ruling of the court is stated, except the final decree. There is no certificate showing that any exceptions were taken; there is no bill of exceptions in the case, and there is no certificate of the judge of the district court or of his clerk, showing that the evidence has all been presented and sent to this court. No assignment of errors is in the statement or made in this court now, excepting the errors assigned on the motion for a new trial. In appealing the case to this court, the notice of appeal specifies that

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the defendant appeals from the whole of the judgment made and entered against him on the twentieth day of May, 1872; and also from the decision of the judge of said court upon a motion for a new trial in said action. The notice may include both appeals, and, so far, the appellant was correct in practice.

In order to render an appeal effectual for any purpose, in any case, a written undertaking shall be executed on the part of the appellant, by at least two sureties, to the effect, etc., in a sum of money not less than three hundred dollars; or that sum must be deposited, etc.; and by section 303, on page 78 and 79 of the fifth session laws, "in all cases the undertaking or deposit may be waived by the written consent of the respondent." In this case there is no pretense that there is either a deposit or a waiving; but on the part of the appellant, it is insisted, that there is one bond in the case, which is ample in amount with good sureties.

Suppose we had the certificate of the clerk of the district court, to the effect that the appellant had taken an appeal, and that he had deposited with him the sum of three hundred dollars to pay all costs and damages that might be awarded against him on his appeal from the judgment aforesaid; and after making the deposit, for some cause, he should become doubtful about such appeal, and he should dismiss the appeal, pay up the costs and damages, and then call for his deposit, and the clerk should then say to him, "In your notice of appeal you gave notice of an appeal from the order overruling the notice for a new trial, and that appeal you have not dismissed." Might not the appellant then say. "That appeal I never perfected, either by obtaining the written waiver of the respondent, making the deposit or by giving a bond that in any way refers to the appeal from that order. Consequently, under section 296, on page 136 of the second session law, the supreme court never obtained jurisdiction of that appeal. And here is your receipt for the deposit, in which you state that the money is to be returned to me upon producing the certificate of the clerk of the supreme court, showing that I have

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paid all costs and damages awarded against me on the appeal from the judgment in the district court, and here is the certificate of the clerk of the supreme court to that effect. I now want the money"? Would not the clerk of the district court then be compelled to give up the money?

We think it would not be legal for the clerk of the district court to apply the deposit any differently than to the purposes for which it was made.

Then supposing a bond was given, as in this case, ample in amount, if you please, for both appeals, with good sureties, but it should, as this bond does, say: "Whereas a judgment and decree was rendered against said J. B. Oldham and in favor of said intervenors, Mullany & Binns, on the twentieth day of May, A. D. 1872, for the sum of three hundred and seventy dollars and seventy-four cents, and eighty-seven dollars and twenty-five cents costs of suit, and whereas said J. B. Oldham has appealed to the supreme court of Idaho, from the decision, judgment, and decree of said district court; now, in case of," etc.; the bond saying not a word about the appeal from the order of the judge of the district court overruling the motion for a new trial, could such a bond possibly be used on an appeal from any order?

It seems to the court, that the sureties in such a bond can not be made liable for anything not in the bond, and that it can not be made effectual upon an appeal from the order overruling the motion for a new trial.

In this case there is no certificate of the clerk, that any deposit was made; no written consent of the respondent of a waiver, under the statute; and no bond perfecting the appeal from the order overruling the motion for a new trial.

We are well aware of the fact, that the statute does not seem to require these things to be sent to the supreme court; but the statute has actually made these things necessary, in order to perfect an appeal, so as to give the supreme court jurisdiction to entertain and determine the case. As long as the above acts are necessary to give the supreme court jurisdiction of the case, some measures are necessary, to inform that court that it may

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try said cause, where there is no pretense of making a deposit, or of a waiver, in writing; but the party, as in this case, relies upon a bond, which is sent to this court in the transcript; and when examined, it is found to be no bond on appeal from the order overruling the motion for a new trial; that appeal must, then, fail, and the evidence in the statement goes with it.

Where there is no written waiver and no deposit we must regard the giving of the bonds under section 296 of the civil practice act necessary to give jurisdiction. The supreme court of the United States have decided, in 8 Wall. 309, that no consent of counsel can give jurisdiction; but supposing the court should consider the case properly appealed from the judgment and from the order overruling the motion for a new trial, the district court has made a decree, although the case from the records appears to have been tried as a law case, without objection, no findings are on file, and none requested, no exceptions were taken upon the trial, and none to any ruling of the court, and nothing to show that the court made any rulings; no errors have been assigned, except the errors assigned on the motion for a new trial. If errors had been assigned without exception, this court could not consider such errors, any further than they are made to appear of record. There is no certificate showing that all the evidence that was before the district court is now before this court, and no exceptions to any ruling of the court. We must insist that the question of appealing a case, or from an order in a case to this court, this being an appellate court, is the way by which this court gets jurisdiction of the case. Whenever this court can discover that the steps necessary to give it jurisdiction have not been attempted, such matter or question should be dismissed from its further consideration; and we think it may be dismissed, either on its own or some other motion. In the case of *Horn v. Volcano Water Company*, 18 Cal. 141, it was decided that, where the notice of appeal recites that the appellant appeals both from an order granting a writ of assistance and from an order refusing to set it aside, and the undertaking or appeal stipulates to answer the conse-

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quences of the appeal from the former order only, held, that this order alone will be considered by the supreme court.

For these reasons the judgment of the district court must be affirmed.

ALONZO LELAND, APPELLANT, v. CHARLES ISENBECK AND GODFREY GAMBLE, RESPONDENTS.

SHERIFF'S SALE—SHERIFF'S DEED.—In order to uphold a sheriff's deed, it must appear that a valid judgment was obtained against the party whose property is sought to be conveyed by it, and that the property was sold upon an execution issued upon such judgment.

JUDGMENT.—A judgment which is void *ab initio*, may be attacked, collaterally, without appealing therefrom to this court.

QUITCLAIM DEED—NOTICE.—A purchaser of real estate who takes a quitclaim deed from his grantor, is presumed to have notice of any defects in his grantor's title; and he purchases at his own risk.

EVIDENCE—ERROR.—It is not error for the court below to admit improper evidence, such as a sheriff's deed, without first showing a valid judgment, unless objection be made to its introduction.

INSTRUCTIONS.—A purchaser of real estate taking a quitclaim deed therefor, not being a *bona fide* purchaser without notice, it was erroneous for the court, by its instructions, to leave that question to be decided by the jury, from the evidence.

ESTOPPEL—INSTRUCTIONS—PLEADING.—A party to an action can not avail himself of the benefits of an estoppel, unless he plead it. It is error for the court to submit such question to the jury by instruction, unless it be pleaded.

INSTRUCTIONS.—It is error for a court, in its instructions to a jury, to assume that material disputed facts have been proven. It is for the jury to find the facts from the evidence.

ESTOPPEL.—In order to create an equitable estoppel, there must be an admission, act, or declaration intended to influence the conduct of another; and actually leading him into a line of conduct which would be prejudicial to his interests, unless the party estopped be cut off from the power of retraction.

APPEAL from the first judicial district, Idaho county.

Curtis & Barbour. for the appellant.

A. E. Isham, for the respondents.

HOLLISTER, J., delivered the opinion. WHITSON, J., concurred. NOGGLE, C. J., dissented.

This is an appeal from a judgment recovered by the de-

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fendants against the appellant, in the district court of the county of Idaho, in which the appellant brought his suit for the recovery of the possession of certain premises described in his complaint, and which, he alleged, was unlawfully withheld from him by the defendants. On the trial the plaintiff showed title to the premises in controversy, and the defense relied upon was, that his title had been divested by a sale by the sheriff of said county of the property, to Alexander & Co., on an execution issued upon a judgment against the appellant, in their favor, and from whom the defendants derived their title. The defendant, Gamble, also pleaded an estoppel, which will be hereafter noticed.

For the sake of perspicuity we will proceed to consider the case, as to the defendants separately, for their defense in some respects rests on different grounds. Isenbeck's defense is made to depend entirely upon the question whether the title derived by Alexander & Co. under the sale on execution is good or not, and whether, if not good, he purchased in good faith, and without notice.

His answer denies the ownership of the premises by the plaintiff; denies that he (the defendant) holds possession unlawfully and willfully; denies that the issues and profits are as stated in the complaint; denies the plaintiff's damages, and that he is injured as he alleges.

The evidence shows a sale of the property of E. B. Johnson et al. to Alexander & Co., who were the plaintiffs in the execution, and the conveyance to them of the property by the sheriff by deed, and a conveyance from them by quitclaim to this defendant, but it fails to show any judgment to support the sale to Alexander & Co. It is unquestionable that such evidence does not show even a *prima facie* title in Alexander & Co. In order to uphold and give validity to a sheriff's deed, it must appear that a valid judgment was obtained against the party whose property is sought to be conveyed by it, and that the property was sold upon an execution issued upon such judgment. These prerequisite proofs must be produced before a *prima facie* title can be established under the deed.

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It is urged, however, that he was a purchaser in good faith, and even if Alexander & Co.'s title was not good, he could be protected notwithstanding. In answer to this, it is claimed that the judgment of Alexander & Co. against the plaintiff was *ipso facto* void, and that neither they nor their grantees could take any title under it as against the defendant in execution.

That the judgment was void had been decided by this court at the January term, 1872. This was the judgment of this court as to the validity of that judgment, the effect of which was not that it was void only from the time the decision was made, but that it was void *ab initio*. As such it could have been attacked in any collateral proceeding without appealing the question to this court. We are not disposed to discuss the question as to the effect of a sale under a void judgment, upon the title of one who purchases in good faith from a party who takes his title directly from the sheriff. That point was not considered in the argument, nor is it necessary to the decision of the case. The defendant purchased with notice of the defects of Alexander & Co.'s title, because he took his title by quitclaim deed. In such cases the law presumes that the purchaser had notice of the defects of his grantor's title, and that he purchased at his own risk. There was no error, however, in admitting the deeds in evidence, because no objection was made by the plaintiff to their introduction. But it is objected that the court erred in giving certain instructions at the request of the defendants. These instructions are as follows:

2. "The sheriff's deed to Alexander & Co. gave color of title, and the deed to Alexander & Co. conveying to Isenbeck gave color of title in Isenbeck; and if the jury believe from the evidence that Isenbeck went into possession of the property in good faith, believing such title to be good, and that he, or he and the defendant Gamble, expended large sums of money in developing the mines or in making valuable improvements thereon, with the knowledge of plaintiff, under such circumstances that plaintiff might have necessarily notified them of his claim to the property, and that

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plaintiff did not give such notice, then it makes no difference whether the sheriff's deed was good or bad, the plaintiff is estopped from setting up or claiming any right or title whatever to the property."

"If the jury believe, from the evidence, that the plaintiff was here in Washington when the said Isenbeck and Alexander were, and that said Alexander & Co. were urging the payment of the purchase money from Isenbeck of said property, and that he represented that he did not intend to claim said property or litigate the title to the same, and that those representations came to the knowledge of Isenbeck, and that he, the said Isenbeck, confiding in such representations, paid such purchase money, then the plaintiff is estopped from setting up any title to, or claiming said property."

If plaintiff was here in Washington, when the said Alexander & Co. and Isenbeck both were, and knew that the said purchase money for said property or one thousand six hundred dollars thereof was not paid, and that Alexander & Co. were urging payment of the same, it was his duty to have notified Isenbeck of his, plaintiff's, claim to the property, and that if he did not do so, and if said Isenbeck was induced to pay said money by the plaintiff, and in ignorance of plaintiff's claim, then the plaintiff is estopped from claiming the property.

The second instruction was clearly erroneous, so far as Isenbeck was concerned, in this: The sheriff's deed to Alexander & Co., being unsupported by a valid judgment, was not even *prima facie* evidence of title in them; and further, it did not purport to convey the property of the plaintiff. It was only a conveyance of the property of E. B. Johnson and others. The deed from Alexander & Co. to Isenbeck, being only a quitclaim, conveyed no better nor higher title than was vested in them by the sheriff's deed. Isenbeck, deriving his title by such a conveyance from Alexander & Co., was not a *bona fide* purchaser without notice. The court should have so instructed the jury, instead of leaving the question of good faith to be determined by them from the proofs in the case. Isenbeck not having pleaded any

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such matter as therein stated, nor indeed any other matters of estoppel, could not avail himself of any such defense. To have entitled him to the benefit of an estoppel, he would have pleaded it, for it being a defense personal to himself, if he did not set it up, he must be considered to have waived it.

The fourth and fifth instructions, as they related solely to the estoppel, are objectionable on the same grounds, and for the further reason that had he pleaded it, the matter therein stated would not have amounted to an estoppel. Isenbeck had purchased the property before it was pretended that the plaintiff made the representations alleged, and was, therefore, under legal obligations to complete the payment to Alexander & Co. No matter how strong the inducements which the plaintiff's representations held out for the payment of the money may have been, Isenbeck could not, by pleading them, have been released from his liability to Alexander & Co. It may be stated as another objection to these two instructions, that they assume that Isenbeck and Alexander & Co. were in Washington, and do not leave this fact to be found by the jury, as they do the question whether the plaintiff was or was not in the place.

This brings us to the consideration of the nature of Gamble's defense, and of the proceedings of the court in trying the case. Gamble was made one of the original defendants in the suit, and put in his answer denying that he was working the mine; the unlawful withholding of the possession; and disclaiming any interest in the property. Subsequently he filed what his counsel called, and what was treated as, a supplemental answer, repeating substantially what he pleaded in the first answer, except as to such matters as were set up in twelve other pleas, which were stricken out by order of the court.

Thereafter he obtained leave, and filed an amended supplemental answer, in which he denied plaintiff's ownership of the property in question, and of his right thereto; denied the unlawful withholding; denied the issues and profits of the mine; and alleged title in Alexander & Co. under the sheriff's sale on execution, and title thereunder

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in himself, by sundry mesne conveyances from them, the last being a deed executed by Isenbeck, and dated after the answer and the first supplemental answer were put in, and in addition, he sets up an estoppel. From this series of pleadings, extraordinary and irregular as they must appear to all, it will be seen from the amended supplemental answer, that all the matters averred therein are either redundant, irrelevant, or immaterial to his defense, and as such could be reached by a motion to strike out under our practice act. The redundant matters were such as had been pleaded in his first and original supplemental answer, and were therefore unnecessary. The estoppel could not be pleaded, for reasons elsewhere stated, and was therefore irrelevant.

The amended supplemental answer shows that by his own deraignment of title this defendant had traced it back to a source that was utterly worthless. The fountain head was only the sale of the property to Alexander & Co. by the sheriff, which was evidenced not by his deed, but by his certificate of the sale to them. Such a certificate shows neither a legal nor equitable title, for by it nothing passes to the purchaser, which would give him the right to enter into the possession of the property or to sell it; nor could any such right accrue until after the right of redemption had expired and a deed was executed by the sheriff. It was neither *prima facie* evidence of title nor color of title.

Having thus pleaded knowledge of such title, all the evidence of his claim to the property derived therefrom was immaterial, and could be reached in the same manner as the other portions of the same answer. On the coming in of this amended supplemental answer, the plaintiff entered his motion to strike it out, which motion was overruled by the court and the decision excepted to. The other alleged errors are founded upon the instructions at the instance of this defendant. They are four in number, three of which we have already considered; the other is numbered one, and is as follows:

“The deed of Isenbeck to defendant Gamble, of the twenty-third of February, 1872, received in evidence, put

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Gamble in possession of all the rights of Isenbeck, both in the property and in this action, and Gamble may avail himself of every defense in this action that Isenbeck could have done if he had not so conveyed the title."

This instruction did not properly lay down the rule under the pleadings in the case; it goes to the extent, and this was the design of it, that Gamble could plead the same matters of estoppel that Isenbeck could have done if he had so chosen. Gamble was made one of the original defendants, as has been stated, and had put in his answer disclaiming any interest in the property in controversy, and having, as his amended supplemental answer and the evidence shows, purchased the property from Isenbeck, with full knowledge of the plaintiff's claim to it, and if his intention to assert his rights thereto, he could not set up by way of defense any such estoppel as Isenbeck could have pleaded. The doctrine that not only a party but his privies in estate may plead an estoppel, can have no application as to the privies when they could not have been influenced by inducements not held out to them nor operating to determine their conduct. Even if there had been inducements held out by the plaintiff which may have influenced the conduct of Isenbeck, still we can not see how they could affect the conduct of Gamble after the plaintiff had placed upon record his retraction of all that he had previously said or done, and this before Gamble had purchased the property.

In order to create an equitable estoppel, there must be an admission, act, or declaration intended to influence the conduct of another, and actually leading him into a line of conduct which would be prejudicial to his interests, unless the party estopped be cut off from the power of retraction.

The second instruction, so far as it relates to the question of good faith, is erroneous, for reasons already stated in considering the case as to Isenbeck. Gamble, like Isenbeck, took his title by a quitclaim deed, and accordingly with notice of the defects of Alexander & Co.'s title. It rested solely, therefore, upon the validity of their title, and if the judgment, execution, and sheriff's deed to them were nullities, no foundation for any subsequent title derived

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therefrom can be upheld as valid. As we are satisfied no case can be made that will establish a valid defense should a new trial be ordered, we shall simply order a judgment of reversal, and that restitution of the property in question be awarded to the plaintiff.

The appellant has brought here a record containing a mass of redundant matter, and which greatly increases the costs in the case, and we therefore think that he should be required to pay half of the costs in the court.

It is therefore adjudged and determined, that the judgment of the court below be reversed, and a writ of restitution be awarded the plaintiff for the return of the property, and that each party pay one half the taxable costs of the proceedings in this court.

THE PEOPLE, PLAINTIFFS, v. A. J. GRIFFIN AND E. B. BALL, DEFENDANTS.

SUNDAY LAW—POLICE.—The act for the better observance of the Sabbath day, approved January 8, 1873, is a mere police regulation. It does not interfere with any vested rights acquired before its passage, and is a valid law.

CERTIFIED to this court by the district court of the second judicial district, Ada county.

F. E. Ensign, district attorney, and J. Brumback, for the plaintiffs.

J. W. Huston and Clitus Barbour, for the defendants.

NOGGLE, C. J., delivered the opinion. WHITSON and HOLLISTER, JJ., concurred in the judgment.

The defendants in this prosecution are charged with a misdemeanor, for that on the twelfth day of January, 1873, being the first day of the week commonly called Sunday, they did, unlawfully and willfully, keep open for a long time, certain rooms, generally known as the Overland Exchange, situated in Boise city, Ada county, Idaho territory, in which said Overland Exchange intoxicating

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liquors, lager beer, and ale were then and there kept for sale at retail, in violation of the third section of the act entitled an act to provide for the better observance of the Sabbath day, approved January 8, 1873, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the United States of the territory of Idaho. The defendants appeared before the justice of the peace and interposed a demurrer to the complaint, assigning two causes of demurrer. A third cause also appears, but it is more in the nature of advice than a demurrer, and for that reason it will not be considered.

The first cause assigned is that the court had no jurisdiction over the subject-matter of the action. The second cause is "that the complaint does not state facts sufficient to constitute an offense either at common law or against the statute of Idaho."

We think the justice of the peace very properly overruled the defendant's demurrer. From that decision the defendants appealed to the district court. That court, on the request of the parties to the prosecution and defense, certified the case to the supreme court for the purpose of speedily and satisfactorily setting the force and effect of the law providing for the better observance of the Sabbath day, approved January 8, 1873.

The counsel for the defendants claim that the defendants are protected from all such prosecutions as this by their license. Again, it is insisted by them that this law punishes for the same offense twice, and the counsel insist that keeping a room open on Sunday and selling intoxicating liquor therein, is one and the same offense. We think the law makes each of these acts an offense. The counsel for the defendants further insist that requiring that the saloons be closed four days in each month is double taxation; that the license was granted for revenue, and is taxation, and that this law can not amount to a police regulation. The counsel quote much authority in support of their doctrine. We have examined most of the cases referred to with some care, as well as the law on the side of the people; from all of which this court is of the opinion that the judgment of

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the justice was correct in overruling the defendants' demurrer. We think this law is a mere exercise of the police power of the legislature. Some other reasons were urged by the counsel against the validity of the law under consideration that it is unnecessary to notice.

On the part of the people, it was earnestly claimed by the counsel that the law under consideration is the result of a judicious exercise of the police power of the territory, and insist (as we think correctly) that the legislature had full power to pass the law as a police regulation. Blackstone defines such laws as "the due regulation of domestic order, whereby the inhabitants of a state, like a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations."

"We think it is a settled principle," says Chief Justice Shaw, "growing out of the nature of well-ordered civil society, that any holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth is held subject to these general regulations, which are necessary to the common good and general welfare."

The defendants claim that by virtue of the license they hold from the territory of Idaho, they have a contract with the territory that guarantees to them the right to keep their place of business open every day in the year; that to close their said place of business one day in seven, would be a violation of their agreement made with them when they took their license, and would deny them the privilege of doing business at least four days in each month. Citizens of a state or territory can have no vested rights in its existing general laws which can preclude their amendment or repeal, and there is no implied promise on the part of either to protect its citizens against incidental injury occasioned by changes in the law. (Cooley's Const. Lim. 284.)

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The taking out of a license, at most, can only be taxation, and creates no contract between the holder of the license and the people, but if by any possibility it could be considered a contract, it was made subject to the right of the legislature to change or modify the law under which it was granted in the exercise of its police power.

The court is of the opinion, therefore, that unless the legislature are restrained by the organic act or by some law of congress, in enacting the law under consideration, the legislature, as a police regulation, attempted no more than to establish a rule of civil conduct for the people, with which the court have no right to interfere to prevent. With the motives that operated upon the legislature to pass the law, we have nothing to do; they may have been as various as the minds of the different members of that body, and still their motives may have been designed for good. The court is not expected to make or change the law, but to construe it, and determine the power of the law and the power the legislature had to pass such a law; whether that power was wisely or unwisely exercised, can be of no consequence. The character of the act is not changed by any of these things; we must consider it as a part of the police power of the legislature, in the exercise of which that body established the law as a civil regulation for the government of man.

Supposing that, in addition to this law in the regulation of the police power, the legislature should have enacted that all places of public business in Ada county, Idaho territory, should be closed, and remain closed, throughout each non-judicial day, or had enacted that thereafter any person who should sell or give any intoxicating liquor to any minor, or should suffer any minor to play at, or in any way engage in any game of chance; in the place of business of such person, that such person, upon conviction of any such offense, should, in addition to paying a fine, etc., forfeit his license for carrying on such business. We know of no power that could prevent such a law. Should the legislature be of the opinion that the public good required such a law, then courts would have no legal power to determine

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that such an act was even wrong. The counsel for defendants insist with great earnestness, that laws of a general nature must be uniform in their operation throughout the whole state or territory, and that because this law only applies to one county, it is not a general law.

We think it a general law for the county of Ada, uniform in its operation upon the same classes of people throughout the county. Cooley, in his *Constitutional Limitations*, 390, says, after speaking of the business of common carriers, bankers, etc., mechanics' liens, etc.: "If otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class, or locality, to which they apply, and they are then general laws." (See also 37 Cal. 376.) It is urged, as another objection to this law, that it is against public policy. It is not for this court to determine whether the law is politic or not. It may be against public policy for the people of Ada county to rest one day in seven, and the court can not be asked to so determine, for the purpose of destroying any law. In nearly all the states in this Union laws prohibiting secular labor and business of various kinds on the Sabbath day, commonly called Sunday, have been enacted and sustained, with one single exception, in which Judge Field's dissenting opinion so much better accords with wholesome law, that we take the liberty to refer to it, believing it to be the better law. (*Ex parte Newman*, 9 Cal. 518.)

Laws should be sustained and executed that are enacted for the benefit of mankind. More such laws might greatly tend to promote good order in society, increase personal security, public tranquillity, and the supremacy of civil government, and they would, generally, better the condition of society. As long as civil government exists, the legislature must have the power to do what it deems necessary to protect that government, and as long as that body have any regard for the people, to whom they must answer, it is proper that the legislature should feel under obligation to see that laws are enacted that will promote good order in society; in this it may often fail, and, it may be, without any fault of theirs.

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A faithful discharge of legislative power is the only way any government can perpetuate a proper and healthy existence; and to this end the organic act confers upon the legislature of Idaho territory the power over all rightful subjects of legislation. Shall the people of Idaho, in this enlightened nineteenth century, try over again the experiment of a world of human beings unblessed with the salutary restraints of law, simply because we do not get such as we want? Or should the courts sustain a mere police regulation that, properly administered, must result in good to the community? We think the law had better be sustained. We may also think that we could have suggested a more politic law; one that would have been operative throughout the territory, and therefore more general.

After carefully considering all that has been said for and against the law, we have concluded to sustain it as it is, believing that the legislature, in the exercise of its politic power, did all they could then do to restrain evil and regulate the conduct of society. Allow the people of Idaho to trust, as they must, to the wisdom of the same power hereafter to make the law more perfect, and to extend its influence over the whole territory. Small as the beginning is, which the legislature have made by this limited reform, it certainly has commenced in the right place; and, we think, the legislature is entitled to great credit for the little that has been done in the exercise of its police power. The law under consideration is a general law; and it is designed to operate uniformly throughout the county of Ada, upon the same classes of people.

The law, in its nature, is not vindictive any further than is necessary to vindicate good order. Such a vindication can injure no one; it can not mean more than to maintain its own justice; it would be worthless if it did less. Cruel laws make cruel people; but is this law a cruel law? We think that no police regulation like the law before us can be cruel. Laws may either be right or wrong, virtuous or vicious, accordingly as such laws are benevolent or selfish. A law designed for the regulation and protection of society can neither be vicious, selfish, nor wrong. This law to

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provide for the better observance of the Sabbath day, approved January 8, 1873, must be regarded as reformatory, resulting from an exercise of the police power of the legislature of Idaho territory.

This limited reform could hardly have been commenced in a more appropriate part of the territory. Commencing such legislation as this, making it alone applicable to the county in which the seat of government is located, will be likely to so educate the people and their servants, that the law may be amended, but not repealed.

It is the opinion of the court, therefore, that the law should be sustained.

This case will be remanded to the district court, with direction to affirm the judgment of the justice of the peace, with costs.

**GEORGE GREATHOUSE, RESPONDENT, v. ALBERT
HEED AND MARY HEED, APPELLANTS.**

DEMURRER—COMPLAINT—PLEADINGS.—The objection that a complaint does not state facts sufficient to constitute a cause of action, is never waived.

TOWN-SITE—MAYOR'S DEED.—An applicant for a mayor's deed, for lots in a town-site, entered under the act of congress, must set forth in his application all the facts necessary to entitle him to such deed, as required by the territorial law.

APPEAL from the second judicial district, Ada county.

J. Brumback, for the appellants.

Prickett & Hasbrouck, for the respondent.

NOGGLE, C. J., delivered the opinion. **WHITSON** and **HOLLISTER, JJ.**, concurred.

This is an action prosecuted by the plaintiff in the nature of a suit in equity to quiet the title to the premises referred to in the complaint. The plaintiff in the court below obtained a decree, he claims, that this action is prosecuted under the statute of this territory, known as an act entitled an act to provide for the disposal of land in Boise city, Ada county, Idaho territory, pursuant to the several acts

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of congress in such cases made and provided, on page 29 of the sixth session laws, approved January 6, 1871.

Section 2 of said act, speaking of Boise city, enacts as follows, to wit: "The occupants of said town-site may at any time within sixty days after the time of filing such plat, and the publication of the notice aforesaid, make their respective applications for title to such portion of said town-site as is claimed by them, which applications shall be in writing, and shall set forth that such claimant is an occupant of said town-site, and of the lot or lots, block or portion claimed by him or her, and shall specify in what such occupancy consists, which shall be either actual residence thereon or some permanent improvements on some portion of the lot or block claimed, and shall particularly designate and describe such lots, blocks, and improvements; and said application shall in all cases be verified by the oath of the applicant, or by some person on his or her behalf, in the manner prescribed for the verification of pleadings in civil actions, in courts of justice in this territory; provided, that no claim shall be received, which does not conform to the requirements of this act," etc. It is particularly provided in the aforesaid act, that no claim shall be received which shall not conform to the requirements of this act.

By the sixth section of said law any party claiming a deed of the mayor of said city to any portion thereof, must first pay his fees, which, in this case, were four dollars and twenty-five cents, and then section seven of the same law requires that such applicant must pay for said lot or lots the price fixed by the law therefor to the treasurer of Boise city, who shall give such applicant a receipt therefor, specifying and describing the lands so paid for; and the mayor, on the production of said receipt and the payment of his fees as hereinbefore provided, shall execute and deliver a deed for said lands. Section 3 of the same law, among other things, provided that in case of adverse claims, upon a final decision of such adverse claims the successful claimant shall file with said mayor a certified copy of the final judgment in his favor; and said mayor shall execute and deliver a deed of conveyance accordingly.

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The pleadings in this case do not show that the plaintiff at *any* time applied to the mayor in writing, verified either by his own oath or of any one on his behalf, claiming that he was an occupant of said lot, specifying in what such occupancy consists, that he has paid for said lot, and had paid the mayor's fees. We think, to entitle the plaintiff to recover, the pleadings must show that these things were done as the law requires.

There are six different errors assigned to the rulings of the district court. We will dispose of the third only, which is, "that the court erred in deciding that the complaint set forth facts sufficient to constitute a cause of action." This objection was never waived, and it is sufficient to reverse this decree. The other errors assigned need not be considered for that purpose.

Speaking of complaints, the forty-fifth section of the civil practice act provides that "if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." By the third assignment of errors it is claimed that the court erred in holding that the complaint stated facts sufficient to constitute a cause of action. This court is of the opinion that the facts which, by the law referred to, are made requisite, are not stated in the complaint; for this cause the district court erred in overruling the demurrer. We are of the opinion that the complaint does not state facts sufficient to constitute a cause of action, and that this cause should be reversed.

The judgment in this case, therefore, is reversed, and the cause remanded to the district court with directions to allow the plaintiff to amend his complaint if he shall see fit to do so. Reversed.

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ANDREW KRAMER, PLAINTIFF IN ERROR, v. GEORGE F. SETTLE, DEFENDANT IN ERROR.

EVIDENCE—RES GESTÆ.—In order to entitle declarations to be received in evidence as part of the *res gestæ*, they must be a part of an act, and such as may serve to explain or qualify it, and must have been made while such act was being performed.

RECORD OF MINING CLAIMS—EVIDENCE.—The statute which provides that copies of papers duly filed in the recorder's office, certified by the recorder, shall be received with like effect, in courts, as the original instruments, etc., gives the same effect to such copies as courts would give to the originals when produced, and their execution proved.

RECORD OF MINING CLAIM—NOTICE OF LOCATION OF MINING CLAIM.—If one of several co-locators of a mining claim cause a notice of location of a mining claim to be recorded in the name of himself and his co-locators, in the absence of proof to the contrary, it will be presumed that the written consent of such co-locators had been seen, and a minute made thereof by the recorder, before recording such notice.

REPRESENTATION—WORK DONE ON MINING CLAIM—INSTRUCTION.—The court below was requested to instruct the jury that "work done outside of a mining claim, and with direct reference to the claim, may be considered as work done on the claim." To this the court added the following qualification: "The evidence of such work having been done should be received with great caution, and it should appear clearly that such work was intended for the improvement of such claim, and no other," and gave the instruction so qualified: *Held*, that this was not erroneous.

MINING CLAIM—REPRESENTATION BY WORK.—The failure to perform the work in a mining claim required by law, amounts to an abandonment of the claim, and thereupon it may be occupied by another.

ERROR to the district court of the second judicial district, Alturas county.

J. Brumback, for the plaintiff in error.

Prickett & Hasbrouck, for the defendant in error.

HOLLISTER, J., delivered the opinion. WHITSON, J., concurred. NOGGLE, C. J., dissented.

This is an action brought by the plaintiff in error against the defendant in error to recover the possession of a certain mining claim situated in Alturas county, which it is alleged the defendant unlawfully withheld. The judgment in the court below was for the defendant, to reverse which the plaintiff sued out his writ of error. The plaintiff assigns the following errors, viz.:

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1. The court erred in sustaining the objection of respondent's counsel to the question propounded to the witness, John Gray.

2. The court erred in overruling the objection of plaintiff's counsel to the introduction in evidence of the notice of the relocation by the plaintiff, of the mine.

3. The court erred in giving certain qualifications to one of plaintiff's instructions.

4. The court erred in refusing to instruct the jury as to the work to be done in the mining claim as requested by the plaintiff.

5. This is essentially the same as the fourth.

We have given to these various questions the most careful and earnest consideration, and will now proceed to give the result of our deliberations.

The question propounded to the witness Gray is as follows: "Where was the location of the Phoenix ledge as stated to you by Mr. McLaughlin in July 1864, while standing at the mouth of the Idaho tunnel?"

It appears from the record that this mine was located by the plaintiff, together with McLaughlin, and four others, in the preceding March, and that the declaration of McLaughlin was sought to be established upon the ground that it was part of the *res gestæ*. In order to entitle the evidence to be received, the declaration must be part of an act which may serve to explain or qualify it, and made while such act was being performed. If such declaration does not accompany the act, it can not be received. In this case the declaration was made some months after the mine was located, and formed no part of the act of location.

In *Noyes v. Wurd*, 19 Conn., 250, it was held, where a party, on removing an ancient fence, put down a stone in one of the post-holes, and the next day declared that he had placed it there as a boundary, this declaration, not constituting a part of the act done, was inadmissible in his favor.

And so, in *Johnson v. Sherwin*, 3 Gray, 274, the supreme court of Massachusetts held that the reasons given by a wife, on the day after her return to her father's house, for leaving her husband's house are not a part of the *res gestæ*, as con-

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nected with and part of the act of leaving her husband's house, and so are not admissible in an action brought by her father against the husband for necessaries supplied to the wife.

The second assignment of errors we might feel disposed to consider good, had not the common law rule of evidence been changed by our statute.

This statute has provided that copies of papers duly filed in the recorder's office, certified to by the recorder, shall be received with like effect in courts, in actions and proceedings, as the original instruments, papers, and notices filed or recorded, could be produced. The phraseology of the statute is somewhat awkward; but it is evidently meant to give the same effect to such copies as courts would give to the originals when produced and their execution proved. It would be absurd to suppose that the legislature intended that the execution of papers thus filed or recorded, must be proved before the certified copies can be received in evidence.

By section 5 of the mining laws of the territory, it is required that all claims shall be recorded in the recorder's office; when this is done, the claims, or, what is the same thing, the notices, may be withdrawn by the claimant after they are recorded, and in process of time they might be lost or destroyed. It would necessarily follow, in such case, that they could not be produced, to be identified and proved, and there could be no proof on the subject if the record did not furnish it. The purpose of the law would therefore be entirely defeated.

This law is framed upon the theory, that no one but the person who executed the notices has any interest in having them recorded. The record therefore furnishes presumptive evidence of their execution, and this presumption can only be overcome by countervailing testimony of a preponderating character, which is always addressed to the judgment and understanding of the judge who tries the case, and when determined by him, upon such evidence, it is not for the appellate court to hold the decision erroneous. Like other questions of evidence, when there is a conflict, it is for the

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court (or jury, as the case may be) to decide upon which side it preponderates; and the appellate court, sitting for the review of the evidence, and not for the purpose of weighing it, will not disturb a finding even though it may think the preponderance the other way.

This notice purports to be signed by the plaintiff, Lynch, Nordheimer, McLaughlin, Taggart, and Stevens, claiming, as tenants in common, a mine differing somewhat in its boundaries from the one first claimed and located some months after the location of the premises in controversy by the defendant, and recorded in the recorder's office November 2, 1868, at the request of Nordheimer. The court admitted the copy, notwithstanding the plaintiff denied while on the witness stand having signed it, or authorized any one to sign it for him, or that he had any knowledge of it until a few days before the trial, or that he ever claimed under it.

Section 5 of the act in relation to mines provides that no person shall record claims in the name of any other person, unless he have the written authority of such person or persons, and exhibit the same to the recorder, and make affidavit, to be taken by such recorder, that the written authority is genuine, who shall make a minute of such authority on his records, and file such affidavit in his office.

Without stopping to discuss the question whether one person having an interest in common with another in a mining claim, shall first obtain the written authority or consent of his co-tenant before the notices shall be recorded, it is enough to say, that in the absence of proof that it was not done, we must presume that the recorder had seen and made a minute of such written consent before the notice was recorded.

The third error complained of, is in giving by the court the qualification to the following instruction: "Work done outside of a mining claim, and with direct reference to the claim, may be considered as work done on the claim." To which the court added the following qualification: "The evidence of such work having been done, should be received with great caution, and it should appear clearly that

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such work was intended for the improvement of such claim and no other.”

We think there was no error in this, for the reason that the qualification only enunciates a general principle of law, which requires that juries should receive evidence with caution, and that it should clearly be made to appear that the question sought to be established by it was thereby proved. It does not go to the extent that the fact should thereby be established conclusively, or that it should be satisfactorily established, beyond a reasonable doubt. It only lays down the proposition that the minds of the jury shall be satisfied by evidence clearly preponderating upon the point.

The court was asked by the plaintiff's counsel to give the following instruction: “It is not necessary that the plaintiff's claim should be good as against the defendant, that he should have his notice of location recorded within ten days after posting the same, or that six hundred dollars' worth of work should be done on his claim within six months after posting his notice. It is sufficient, so far as the defendant's rights are concerned, that the notice was recorded, and the necessary amount of work done before the defendant made his claim. If you find that the plaintiff's notice was recorded, and the required amount of work done before the defendant made his location, the possession of the plaintiff under the law is good. The defendant can not take any advantage of plaintiff's non-compliances with the mining law, within the time limited by such law.”

This instruction was given so far as it related to the recording of the notice, and refused as to the remainder. The refusal of the court to give the instruction as asked, and the giving it as qualified, is assigned as the fourth and fifth errors.

This brings us to the consideration of the title which the plaintiff had to the premises, under the mining laws of the territory, and of his right to recover. It appears that the plaintiff was tenant in common with five others in a mine of twelve hundred feet in length, and that it was for the recovery of his portion that the suit was brought.

The instruction as asked, without the qualification, lays

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it down as a proposition of law, if the requisite notice is given, and the necessary amount of work done, before the defendant made his location, that the possession was thereby made good. The instruction lays out of view the question whether the plaintiff, after having given the notice and performed the work, may not have abandoned the claim altogether. This he could do, and yet retain no title, though the requisite notice was recorded, and the work done, and the defendant in such case might appropriate the claim to his own use. It assumes that if these prerequisites had been complied with before the defendant laid his claim, the plaintiff could hold it against him, however convincing to the minds of the jury the proofs of abandonment might be. In this view, it was proper for the court to qualify it in the manner it did.

Assuming, however, that it was designed to lay down the law as to what constituted a statutory title to this species of property, we will proceed to consider it in that light. To do so intelligently we have thought it important to refer to so much of the mining law of the territory, as is thought to have any bearing upon the question.

Section 1 provides that any person or persons who may hereafter discover any quartz lead, or lode, shall be entitled to one claim thereon by right of discovery, and one claim each by location.

Section 3 provides the mode in which the claim shall be marked or designated, the name of the locator, the number of feet claimed, and the time it was taken.

Section 4 makes provisions for the location and claim in a body, by two or more persons, by giving a notice, specifying the number of claims located and the name of each person joining in such notice, which shall be in writing, limiting the claim of each to two hundred feet, except when necessary to include a discovery claim. It further provides that persons so joining in one notice shall be considered as tenants in common, and the work required to be performed on a quartz claim, to entitle the locator or his assignees to hold the same as real estate, may be performed on any one

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of the claims, so held in common, including the discovery claim.

Section 5 provides that all claims shall be recorded in the recorder's office within ten days from the time of posting the notices thereon, except when the claim is located more than thirty miles from the county-seat, in which case the time shall be extended fifteen days.

Section 6 provides that quartz claims, recorded in accordance with the provisions of the act, shall entitle the person or persons so recording, to hold the same to the use of himself, his heirs and assignees; provided, that within six months from and after the date of recording, he or they shall perform or cause to be performed thereon, work amounting in value to one hundred dollars for each claim of two hundred feet.

By section 7 it is provided, that any person or persons holding quartz claims in pursuance of the provisions of the act, shall renew the notice required in sections 3 and 4, at least once in twelve months, and perform fifty dollars worth of work annually for each claim so located.

We have given these provisions of the act a careful examination, in order to determine whether the estate with which it was the design of the law to invest a claimant, is made to depend upon the performance of the work which is required within the time prescribed, or whether the estate rests in the claimant when the work is done at any time before another lays claim to the mine.

We are constrained to hold that the work to be done must be performed within the time limited by the act, as a condition precedent, before the title can vest under the provisions of section 6, and that it can not be kept good thereafter unless further work be done, as required by section 7. If these requirements are not observed, the claim may be considered abandoned, and another may enter and appropriate it to his own use. The policy of the law on the subject of these mining claims, seems clearly to be that they shall be worked in good faith, and to the extent and within the time required by the law, and that no encouragement shall be given to merely speculative operators.

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It is a matter of public notoriety that the enterprise of many who might wish to work mines, is often discouraged by a mere location of another, with but a slight amount of work performed, and more especially, when it is considered that there is a public sentiment among miners that no one shall be permitted to jump such claims with impunity. Under such discouragement, labor and capital are diverted into other channels, and the law relating to mines is in this way made subsidiary, not to the interests of the laborious, enterprising miner, but to those of the idle prospector or the scheming capitalist. It is better to hold that the title to these mines shall be made to depend upon the work to be performed within the statutory limitations, than to put such a construction upon the law as will favor only those who are not laboring diligently and in apt time to develop the riches which lie hidden in the earth.

This view of the law is strengthened by the decision of the supreme court of California in *Dupuy v. Williams*, 26 Cal. 309, where it is held, that the failure to perform the amount of work in a mining claim, required by the local mining laws or regulations established and in force in the district where the claim is located, amounts to an abandonment of the claim, and thereupon it may be occupied and appropriated by another.

It is strongly urged as a reason why the court should not put this construction upon the law, that most injurious if not fatal consequences would follow to those who have purchased in these claims, and invested large sums in working them. To enforce this view, it is claimed, that the evidence of the work performed rests in parol, and that in most cases witnesses can not be found to prove it.

By an attentive examination of the act it will be seen that the legislature has carefully guarded against such consequences by providing a mode by which such evidence may be preserved of record by all parties interested, however remote they may be from the original claimant.

Section 8 is full and comprehensive on this point. It provides that any person or persons desiring to preserve and perpetuate testimony as to the sufficiency of the amount of

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work done on any claim or claims, to entitle him or them to hold them as real estate according to the provisions of section 6, may take two disinterested persons to view such work, who shall carefully examine the same; immediately after which they shall go before the county recorder, or some magistrate in the county, and take and subscribe an affidavit containing a description of the location of the claim or claims on which work is performed, the character and value of such work, and the date when they received the same, which affidavit shall be filed by the recorder and carefully preserved. Such affidavit or a certified copy of the same under the seal of the county recorder, who has the control of the original affidavit or affidavits, shall in any court in the territory be *prima facie* evidence of the character and amount of labor performed on the claim or claims which are described in the affidavit or affidavits.

This section not only applies to the work performed within the first six months, but embraces all subsequent work expended upon a claim.

It is thus seen that the law places the power of perpetuating the necessary evidence as to the character and amount of work done, not only in the original locator, but also in his heirs and assignees so long as they continue to work the claim. It is true the evidence is but *prima facie*, but it is sufficient for the purpose until the opposite party shall succeed by counter testimony of a preponderating character in overturning it. This, it will be found in all cases, will be a difficult if not an impossible thing to do.

Conceding, however, that section 8 only provides for perpetuating the testimony as to the amount of work done, within the first six months, the apprehended hardship need not follow. It is competent for any one owning a mining claim by location or purchase, when he renews his notice, as provided in section 7, to relocate the claim and put in his proofs as provided in section 8. If he fail to do this, it will be laches of which he can not complain.

All purchasers, if they fear they can not show by parol testimony that the necessary work has been done by their grantors, can go to the recorder's office for such evidence,

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and if they fail to find it, and purchase, they can not be considered *bona fide* purchasers, and must, as a matter of course, take all the risk of having their title defeated.

We are of the opinion there are no errors in the record, and that the judgment of the court below must be affirmed.
Affirmed.

The petition for a rehearing having been filed herein since the judgment of affirmance was given, we have gone carefully over the grounds assumed, and can see but one point on which to modify our opinion then expressed, and that is upon the admissibility of the notice of relocation. We then placed our ruling on that point, on the ground that we could not see that it had any particular bearing in the case. We now put this question entirely upon the statutory provision, in regard to the admissibility of such evidence, which clearly upholds the ruling of the court below.

The petition for a rehearing is therefore denied.

GEORGE L. GREATHOUSE, RESPONDENT, v. ALBERT
HEED AND GEORGE RUNDELL, APPELLANTS.

STATUTORY CONSTRUCTION.—When we know the reason which alone determined the will of the law-makers, we ought to interpret and apply the words in a manner suitable and consonant to that reason, and as will be best calculated to effectuate the intent.

IDEM.—The prior state of the law will sometimes furnish the clue to the real meaning of the ambiguous provision of a statute.

JURISDICTION.—Before a court, clothed with jurisdiction of a person or subject-matter, can be ousted of it by the creation of another forum, having the same power, the grant of jurisdiction to the latter must contain words of exclusion.

IDEM—PROVISO.—A proviso in a statute is to be strictly construed. Its province is not to enlarge or change the purpose of the enacting clause; and its terms may be limited by the general scope of the enacting clause to avoid repugnancy.

IDEM.—It is a maxim of interpretation that, in ambiguous things, such a construction is to be given to a statute, that what is inconvenient and absurd is to be avoided.

JURISDICTION—PROBATE COURTS—DISTRICT COURTS.—The act of congress, approved December 13, 1870, giving jurisdiction to the probate courts in certain cases, does not confer exclusive jurisdiction upon those courts—in

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such cases. It does not take away the jurisdiction of the district court therein, but the power of the district courts and the probate courts is by said act made concurrent in certain cases.

STATUTORY CONSTRUCTION—PROVISO.—Some effect should be given to a proviso in a statute, if possible; but if, by doing so, the manifest intention of the act, as gathered from its general scope and the circumstances connected with its passage, will be defeated; or, should the meaning of the proviso be such as to leave the court in doubt respecting its aim, then there is no alternative but to reject it as of no validity.

LEGISLATIVE POWER.—When the act of congress of December 13, 1870, had invested the probate courts with enlarged jurisdiction, it was competent for the territorial legislature to limit and define its character, and to extend it, except as to the amount involved. It was, therefore, competent for the legislature to provide that the jurisdiction of the district and probate courts, in certain cases, should be concurrent, as is provided by its act of January 11, 1871.

APPEAL from the second judicial district, Ada county.

Action commenced in the district court upon a promissory note for the recovery of a sum within the jurisdiction of the probate court. The plaintiff had judgment.

J. Brumback, for the appellants.

Prickett & Hasbrouck, for the respondent.

HOLLISTER, J., delivered the opinion, WHITSON, J., concurring specially. NOGGLE, C. J., dissented.

This case is brought here from the district court of Ada county, and the question pointed out for consideration is this: Does the act of congress of the thirteenth of December, 1870, confer exclusive jurisdiction in all civil cases when the amount in controversy does not exceed the sum of five hundred dollars, exclusive of interest, upon the probate court of the territory?

The act is as follows: "That probate courts of the territory of Idaho in their respective counties, in addition to their probate jurisdiction, be and they are hereby authorized to hear and determine all civil causes wherein the damages or debt claimed does not exceed the sum of five hundred dollars, exclusive of interest, and such criminal cases arising under the laws of the territory as do not require the intervention of a grand jury. Provided, that

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they shall not have jurisdiction in any matter in controversy, where the title, boundary, or right to the peaceable possession of land may be in dispute, or in chancery or divorce cases; and, provided further, that in all cases an appeal may be taken from any order, judgment, or decree of said probate courts to the district court."

Section 2. "And be it further enacted, that all acts, and parts of acts, inconsistent with this act, are hereby repealed. Provided, that this act shall not affect any suit pending in the district courts of said territory at the time of its passage."

Had the question been made to depend upon the title of the act, or the enacting clause, there would have been no difficulty in solving it; for it is clear there is nothing in either, which by any known rule of interpretation, would lead to the conclusion that congress intended to take away the jurisdiction of the district courts with which they had been clothed by the organic act, and to give it to these inferior courts exclusively. It is claimed, however, that the proviso in the act, that it shall not affect any suit pending in the district courts at the time of the passage, necessarily means that, except as to such suits, the probate courts are alone authorized to hear and determine all civil cases embraced within the act.

Sedgwick, on Constitutional and State Laws, page 228, says: "The reason of the law, that is to say, the motive which led to the making of it, and the object in contemplation at the time, is the most certain clue to lead to the discovery of its true meaning." On page 272, he further says: "When once we certainly know the reason which alone has determined the will of the person speaking, we ought to apply the words in a manner suitable to that reason alone." Says Blackstone, in the third volume of his Commentaries, page 236: "That as to the subject-matter, words are always to be understood as having regard thereto; for that is supposed to be in the eye of the legislator, and all his expressions are directed to that end." And on page 237: "The most universal and effectual way of discovering the true meaning of a law, where words are dubious, is by consider-

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ing the reason and spirit of it, or the cause which moved the legislator to enact it.”

When we know the reason which alone determined the will of the law-makers, we ought to interpret and apply the words in a manner suitable and consonant to that reason, and as will be best calculated to effectuate the intent. The prior state of the law will sometimes furnish the clue to the real meaning of the ambiguous provision. (Cooley on Const. Limitations, 65.) Having regard to these maxims, it becomes important to examine the previous legislation of congress, and also of the territory, on the subject, with a view to determine the reasons which may fairly be presumed to have governed congress in passing the act in question.

By the organic act creating the territory, provision was made for the establishment of supreme, district, probate, and justices' courts, and for giving to the district courts full chancery, criminal, and common law powers. By this act the jurisdiction of probate courts was confined to matters relating to the probate of wills and the settlement of estates, etc.; and that of justices' courts to such cases as might be confided to them by the laws of the territory within the limits prescribed by the organic act.

On the first day of February, 1864, an act was passed by the territorial legislature, providing that the district courts should have original jurisdiction in civil cases, when the amount in dispute exceeds one hundred dollars, etc. By the same act, original jurisdiction was given to probate courts: 1. Of actions to enforce the liens of mechanics and others; 2. Concurrent jurisdiction with the district courts in all civil actions where the amount in controversy shall not exceed eight hundred dollars.

The jurisdiction of justices' courts was also prescribed by the same act, limiting it so as to meet the requirements of the organic act. This was the condition of the law, as it related to the powers of the several courts, so far as it is necessary to consider it in this connection, until August, 1866, when the act attempting to confer civil jurisdiction upon probate courts was decided by the supreme court of the

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territory to be invalid, because of the want of power in the territorial legislature to confer it.

By this decision, the benefits which it was the design of the legislature to secure to the people by this enlarged jurisdiction of the probate courts, were lost, and they were then thrown back upon the district courts, as the only tribunals in which actions exceeding the jurisdiction of justices' courts could be brought. This was found to be detrimental to the public interests owing to the infrequency of the terms of these courts, there being in some counties but two and in others but one term each year; to provide a remedy for this end, the act in question was passed.

Looking then at the evil of the original system, and the means necessary to remedy it, as well as to the policy of congress and the territorial legislature in respect to the constitution and powers of the judicial department, it is difficult to discover a reason for changing its structure, so radically as to take from the district courts a power which they had always possessed, under the belief that it was essential to the interests of the people, and give it to other courts, which until then had been confined to a jurisdiction of an entirely different character. Before a court clothed with jurisdiction of a person or subject-matter can be ousted of it, by the creation of another forum having the same power, the grant of jurisdiction to the latter must contain words of exclusion. "A mere grant of jurisdiction to a particular court without words of exclusion as to other courts, previously possessing like powers, will only have the effect of constituting the former a court of concurrent jurisdiction with the latter." (*Dellafield v. The State of Illinois*, 2 Hill, 160.) To the same effect in the case of *Cartwright v. B. R. & N. W. & M. Co.*, 30 Cal. 573. In the case of *Sterritt v. Robinson*, 17 Iowa, 61, the supreme court of Iowa say: "The jurisdiction of the district court, which is a superior court of general original jurisdiction, can only be taken away by express words or irresistible implication. No mere negative words will oust the jurisdiction of the superior tribunal." In *Rex v. Morley*, 2 Burr. 1040, under a statute which provided that no other court whatsoever intermed-

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dle with any cause or causes of appeal upon this act, but they shall be finally determined by the quarter session only, the court of king's bench held that that court shall never be ousted of its jurisdiction without express words, adding that the jurisdiction of this court is not taken away unless there be express words to take it away. And so the supreme court of New York, in *Ex parte Heath and others*, 3 Hill, 42, held, that under a charter which gave to the common council of the city of New York the sole power of determining and deciding all elections of all corporate offices, and that each board shall be the judge of the qualifications of its own members, the supreme court was not ousted of its jurisdiction to supervise the proceedings of such council. Cowan, J., says: "The phraseology of a statute designed to oust this court of its jurisdiction of inferior tribunals, must express the intent with such clearness as to leave no room for doubt; mere negative words will in no case answer."

From these authorities it will be seen that the doctrine is well settled, that before a court of general original jurisdiction can be ousted of it, the statute must contain words of exclusion, or its language must be so free from ambiguity as to leave no doubt of the intention of the legislature. Can this be said of the act in question? It is conceded by the counsel for the appellant that the enacting clause will not bear such construction, and that it is only by the help of the proviso, that such meaning can be gathered from it. This proviso clause does not by any fair construction amount to words of exclusion, nor does it imply them necessarily.

It is to be remembered that a proviso is to be strictly construed, that its province is not to enlarge or change the purpose of the enacting clause, and that its terms may be limited by the general scope of the enacting clause to avoid repugnancy. If the enacting clause had in terms made the jurisdiction of the probate courts exclusive, the proviso would have been important. It would have defined the class of cases to which the act applied, and would have taken from its operation suits that were then pending in the

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district courts. The two sections would have been consistent with each other, clear and unambiguous in phraseology, and would unmistakably have declared the intention of congress to change its policy in relation to both the probate and district courts. When, however, its meaning is doubtful, or when the construction sought to be given to it makes the law inconvenient or changes its purpose, courts have no alternative but to construe the enacting clause according to its natural and ordinary import, without regard to the proviso.

It is a maxim of interpretation that in ambiguous things such a construction is to be made that what is inconvenient and absurd is to be avoided. (4 Inst. 328.) It is also a rule in the construction of contracts, that when words are manifestly inconsistent with the purpose and object of a contract, they will be rejected. This rule is equally applicable to statutes.

The first section of the act simply gives to probate courts the power to hear and determine all cases that may be brought before them, without taking jurisdiction of the same subject-matter from the district court. The power of the two courts is made concurrent, and the law meets the wants of the people, inasmuch as it furnishes an additional tribunal, whose terms are held more frequently, and in which the rights of parties may be more speedily determined, leaving them, at the same time, to choose the forum which seems fitted to meet their wants, and in this way the delay necessarily attending litigation, under the former system, may be avoided; on the other hand, if the proviso is to give effect to the enacting clause which is claimed for it, the people will be compelled to resort to one tribunal alone for the redress of their grievances, without any choice of forum; and courts must conclude that the whole policy, both of the territorial and national governments, in respect to the judiciary of the territory, has hitherto been a mistaken one, because it has failed to meet a need which this law alone can supply.

It is claimed that under the rule that effect must be given to the words used by the legislatures, the court can not re-

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ject the proviso as meaningless, but must give it some interpretation which will render it intelligible, as expressing the legislative will. This undoubtedly should be done if possible, so as not to defeat the manifest intention of the legislature gathered from the general scope of the act and the circumstances connected with its passage. Should this be its effect, or should its meaning be such as to leave the court in doubt respecting its aim, then there is no alternative but to reject it as of no validity. We think, however, that it is safe to hold that this proviso was inserted in the act merely as an affirmation of the general principle that by the change in the law suits pending at its passage in the district courts should in no way be affected by it. It was merely a precautionary measure, designed to guard against any misconstruction as to its effect upon such suits, and inserted out of abundant caution by the person who framed the bill.

There is a further consideration which it seems should not be overlooked, and which it is thought important as throwing light upon the question. Congress, by the organic act, clothed the territorial legislature with power to legislate upon all rightful subjects. This carries with it the authority to legislate upon all subjects which, in the opinion of the legislature, the public welfare demands. The exercise of this power must, of course, be in subordination to the constitution of the United States, the laws passed in pursuance thereof, and the principles of natural practice, but within such bounds it is unlimited.

In pursuance of such authority, the legislature, on the eleventh day of January, 1871, passed a law which provides that probate courts shall have concurrent civil jurisdiction with the district courts to hear and determine civil cases wherein the debt or demand claim does not exceed five hundred dollars, and concurrent jurisdiction in all cases with justices' courts. This act was passed after the law of congress under consideration went into effect, and doubtless with a full understanding of its provisions. Its design was to carry out the purpose of the law of congress, and to define more fully the manner in which this enlarged jurisdic-

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tion of the probate courts should be exercised, as well as to prescribe its limits.

Before the passage of the act of congress, the legislature had no power to enlarge this jurisdiction, but when the act had invested these courts with it, it was competent for the legislature to limit and define its character and extent, except as to the amount involved, for it is seen the act took no power from the legislature in any other respect. It could, as it did, make the jurisdiction of the probate courts a concurrent one with that of the district courts, for there is nothing in the act which expressly, or by necessary implication, forbids it. Besides prescribing the nature of their jurisdiction in the manner pointed out, the legislature went on to provide for holding the terms of these courts, defining their practice for taking appeals, and for the fees to which the judge should be entitled.

The legislature, while keeping within bounds of its authority, prescribed the mode in which their new jurisdiction should be exercised so as to give to the people all its advantages without taking from them the right to resort to the other courts of the territory whenever they might choose to do so.

This opinion may not perhaps be thought complete without adverting to the consequences which would necessarily follow to justices' courts, were the construction which is contended for adopted by the court. The act would effect the entire overthrow of their civil and criminal jurisdiction. There is no saving clause in their favor. The act is broad enough to comprehend both them and the district courts, if either, and as effectually excludes the jurisdiction of the one as the other, without saving from its operation suits which might be pending in the justices' courts; there is no intentment that can be indulged in, that will save from its operation the one and not the other.

If the jurisdiction be exclusive as to one, it must be as to both, and the act goes to the extent of substituting a new jurisdiction, exclusive in its character, for both the old ones, to the extent of five hundred dollars, exclusive of interest, and under.

Opinion of Whitson, J., on rehearing.

We are of the opinion that the jurisdiction of the probate courts derived from the act in question is only concurrent with that of the district courts, and that the judgment of the court below must be affirmed.

WHITSON, J. I concur in the foregoing opinion and judgment, although in a similar case, tried before me in Boise county, I held to a different view of the law. I am satisfied, after a more thorough examination of the question, that my first view of the law was incorrect, and that the view of the law as taken by Justice Hollister, in the case at bar, was correct.

ON PETITION FOR A REHEARING.

WHITSON, J. We have carefully examined the petition for a rehearing in this case, and see no reason why one should be granted. Some questions are raised which were not argued upon the hearing already had, but we do not think the positions taken by the petitioner are tenable. Section 32 of the civil practice act, we think, fully authorizes just such a judgment as was given in this case.

As to the point that plaintiff avers no order, but avers in lieu of such order an indorsement and delivery to him of the note, it is a well-known principle of the law merchant, that a bare and naked indorsement is sufficient to pass all the interest of the payee in such a note, and after that, whoever held the note would be *prima facie* the owner. Plaintiff alleges that the payee, Ish, indorsed the note and delivered it to him, and if he was, at the time of bringing the suit, the holder, the presumption must follow that he was the owner. We do not think the allegation that the plaintiff was the owner and holder of the note was a conclusion of law; yet, if it were so, that allegation was mere surplusage, and there was a complete case stated in the complaint without it.

Rehearing denied.

Argument for Plaintiffs.

**THE PEOPLE, PLAINTIFFS IN ERROR, v. C. W. MOORE,
DEFENDANT IN ERROR.**

NATIONAL BANK ACT—STATE—TERRITORY.—The word “state,” wherever used by congress in the currency act of 1864, or in the amendments thereto, should be construed to mean “territory” as well, wherever the same is applicable.

NATIONAL BANK SHARES—TAXATION.—When congress enacted the currency act of 1864, it intended to permit the shares in national banks, in the hands of individuals or corporations, to be taxed, wherever such associations might be organized, whether in states or territories.

IDEM.—Congress did not intend, by the first proviso of the forty-first section of the national currency act of 1864, to require uniform taxation in all the different municipalities of a state or territory, but only that the same should be uniform in the municipality or subdivision in which the bank is located, or in which the shareholder resides.

LEGISLATIVE AUTHORITY—TAXATION.—Congress has sufficiently authorized the legislature of this territory to pass a law requiring the taxation of national bank shares in the hands of individuals or corporations.

CONSTRUCTION—PLACE OF TAXATION.—The limitation as to the place of taxation of bank shares, contained in the national currency act of 1864, and in the act of 1868, amendatory thereof, requiring the assessment to be made “at the place where the bank is located, and not elsewhere,” must be construed to mean the state within which the bank is located.

REVENUE LAW—TAXATION—BANK SHARES.—The revenue law in force in 1871, did not authorize the assessment or taxation of shares of national bank stock in the hands of individuals or corporations.

ERROR to the district court of the second judicial district of Ada county, to review a judgment rendered against the plaintiffs upon sustaining a demurrer to the complaint, on the ground that said complaint does not state facts sufficient to constitute a cause of action.

F. E. Ensign and A. Heed, for the plaintiffs in error:

Has the territory a right to levy taxes upon the shares of stock of national banks owned and held within its limits? Such shares are personal property belonging to the individual. (*People v. The Commissioners*, 4 Wall. 256.) The shares of stock are taxable, not the capital. (*Van Allen v. The Assessors*, 3 Id. 573; 9 Id. 468.) Without any special grant of power the states or territories have a right to tax all property within their jurisdiction belonging to the citizen. (1 Dill. C. C. 314; 12 Wall. 423; 9 Id. 587; 4 Wheat.

Argument for Defendant.

437-439.) The statute of the territory is in strict conformity to the act of congress. (9 Wall. 470.) Under our statute all property, whether real or personal, is taxed at a uniform rate. (3 Am. Rep. 407; 101 Mass. 575.) A party can not complain of his assessment, if his property is taxable, on the grounds that others are not assessed, or that their property is exempt. (1 Dill. C. C. 539; 9 Wall. 470.)

R. Z. Johnson, for the defendant in error:

The judgment of the court below should be affirmed, for that: 1. A territory has no authority to impose taxation upon national bank shares.

And, first, these banks are, as constitutional agencies of the federal government, exempt from such taxation. (*Pittsburg v. First National Bank*, 55 Pa. St. 48; *Van Allen v. The Assessors*, 3 Wall. 589; *Veazie Bank v. Fenno*, 8 Id. 548; *McCulloch v. Maryland*, 4 Wheat. 429; *Bank of Commerce v. New York City*, 2 Bl. 634; *Osborn v. United States Bank*, 9 Wheat. 863; *Weston v. The City of Charleston*, 2 Pet. 449; 12 Stats. at Large, p. 710, sec. 1; 13 Id., p. 425, sec. 2; 12 Id., p. 346, sec. 2; Id., p. 546; 13 Id., p. 218, sec. 1; Id., p. 306, sec. 18; *Bank of Commerce v. New York City*, 2 Bl. 628; *Bank Tax Cases*, 2 Wall. 200; *Brown v. Maryland*, 12 Wheat. 448; *Crandall v. Nevada*, 6 Wall. 48; *Dobbins v. Erie County*, 16 Pet. 447; Currency act of June 3, 1864.) If the territories may impose this tax it must be by virtue of an express grant of the power from congress. (*City of Pittsburg v. First National Bank*, 55 Pa. St. 50; *Van Allen v. The Assessors*, 3 Wall. 595; *National State Bank of Oskaloosa v. Young*, 25 Iowa, 313.) The provisos of the forty-first section of the national bank act are not a grant of any power to tax these national bank shares. First office of proviso. (*United States v. Dickson*, 15 Pet. 165; *Mines v. United States*, Id. 445; *Voorhees v. Bank of United States*, 10 Id. 471; Sedgwick on Stat. & Con. Law, 62, note; *Rice v. Keokuk*, 15 Iowa, 583; *Matter of Webb*, 24 How. Pr. 247.)

And second, congress can not confer the right of taxation upon the states of the union. (*McCullough v. Maryland*, 4 Wheat. 425; *Gibbons v. Ogden*, 9 Id. 198; *Brown v. Mary-*

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land, 12 Id. 448; *Dobbins v. The Com. of Erie County*, 16 Pet. 447; *Nathan v. Louisiana*, 8 How. (U. S.) 82; *Lane County v. Oregon*, 7 Wall. 77; *The Collector v. Day*, 11 Id. 123; *Ward v. Maryland*, 12 Id. 428; *Van Allen v. The Assessors*, 3 Id. 585; *The State v. First Nat. Bk.*, 4 Nev. 355; *Ben-ner v. Porter*, 9 How. (U. S.) 242. The provisos of the forty-first section are to be strictly construed, and they do not extend to the territories. (1 Kent's Com. 385; *United States v. Dickson*, 15 Pet. 165; *Van Allen v. The Assessors*, 3 Wall. 587; Nat. Bk. Act, secs. 6, 9, 30, 40, etc., throughout the act; *Allen v. Pegram*, 16 Iowa, 167; 4 Whart. 422; Ang. & Ames on Corp., sec. 15; Bouv. Law Dict., title Municipal Corporations; *Queen v. Com. of Poor Laws*, 6 Ad. & El. 68; Smith's Com. Stat. Law, sec. 489; *Brown's Lessee v. Blougher*, 14 Pet. 198; Amendments of Bk. Act, 1; Act March 3, 1865; 13 Stat. 498; Act February 10, 1868; Act July 12, 1870; 1 Kent Com. 348; *Hepburn v. Elbz'y*, 2 Cranch, 445; *New Orleans v. Winter*, 1 Wheat. 91; *Barney v. Baltimore*, 6 Wall. 287; *Scott v. Jones*, 5 How. (U. S.) 377; *Messenger v. Mason*, 10 Wall. 507.)

2. The legislature of this territory had not attempted, at the time of this assessment, to exercise this authority; and the imposition of the taxes in question here was not authorized by law. (*County Treasurer v. Webb*, 11 Minn. 503; Ang. & Ames on Corp., secs. 458, 560, 561; 23 Iowa, 149, 450; *Bradley v. The People*, 4 Wall. 459; *Hubbard v. The Supervisors*, 23 Iowa, 147; *The People v. The Assessors of Boston*, 44 Barb. 148, 158; *National Bank v. Commonwealth*, 9 Wall. 359; *Van Allen v. The Assessors*, 3 Id. 581.)

NOGGLE, C. J., delivered the opinion. WHITSON and HOLLISTER, JJ., concurred.

This action is brought by the district attorney against the defendant, to collect taxes on personal property. The defendant appeared and filed a demurrer to the plaintiff's complaint; that demurrer was sustained by the district court; from that decision, sustaining the defendant's demurrer, the plaintiff has appealed to this court. The proceedings in this court seem to be for the purpose of determining the

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question, whether the shares of stock in the National Bank, in the hands of the defendant, were properly assessed in 1871; whether such assessment was authorized by the laws of congress and of this territory. The court will dispose of the three questions argued:

1. Does the law of congress, known as the national currency act of 1864, and its amendments, give the power of taxation to the territories? or has congress by any law prior to the date of the assessment in 1871, extended to Idaho territory the power of taxation? By section 6 of the organic act for this territory it is among other things provided: "That the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and with the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents." This law of congress was in force, and this territory had been organized and was in operation, long before the currency law was enacted by congress. It was then a territory, possessing the inherent power of taxation, a government that could only be sustained by taxation.

We must therefore conclude that when congress used the word state, in the currency act of 1864, or in the amendments thereto, they also meant territory wherever that term is applicable. This conclusion is arrived at after a careful review of the authorities quoted by the counsel on both sides of the case; from the case of *McCulloch v. Maryland*, 4 Wheat. 429, to *Ward v. Maryland*, 12 Wall. 428. From all these authorities, as well as from the very interesting arguments of counsel on both sides, we feel confident that when congress enacted the currency law of 1864, it intended to permit the shares in these national associations in the hands of individuals or corporations, to be taxed, wherever such associations might be organized, whether in states or territories.

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We will next dispose of the last point, and will consider the second point last.

The last point argued is by far the least important point in the case, and the court is now unanimous in the opinion that Congress did not intend that taxation should be uniform in all the different municipalities of states or territories; that all that is meant in the first proviso of the forty-first section of the national currency act of 1864, by requiring that the shares in these national associations might be taxed where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, etc., could only have reference to the taxes of the municipality or county in which the bank was located or the shareholder resided.

It is true that in the case of *Providence Institution for Savings and Jewell v. City of Boston*, 101 Mass. 575, and also in the third volume of American Reports, 407, this question is discussed in such a manner that it is well calculated to deceive and give a wrong impression. The case sustains the law as we understand it; sustains the legality of the tax in Massachusetts by affirming the judgment sustaining the tax. In doing so, however, great labor is expended in reasoning down the objections to the law that some localities in the state might assess a greater tax than other localities in the same state. We think that congress did not attempt to exempt the shares of national banks owned by or in the hands of individuals or corporations from municipal taxation; all that congress did require was that wherever taxed, whether for state, territorial, county, school, town, or city purposes, such shares should not be assessed at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such state.

In the opinion of the court congress has sufficiently authorized Idaho territory to pass a law, requiring the taxation of national bank shares in the hands of individuals or corporations. The limitation mentioned in the first proviso of the forty-first section of the national currency law of 1864, when construed in connection with the act amending the same law approved February, 1868, in relation to taxing shares in

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national banks, and when congress say that “nothing in this act” (meaning the currency act of 1864, aforesaid) “shall be construed to prevent all the shares in any of said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation, in the assessment of taxes, by or under state authority, at the place where such bank is located, and not elsewhere, but not, at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state,” and by said amending act declare that the place where the bank is located, and not elsewhere, in section 41 of the act to provide a national currency, approved June 3, 1864, shall be construed and held to mean, the state within which the bank is located; also in providing that stockholders who did not reside within the state, that their shares shall be taxed in the city or town where said bank is located, and not elsewhere; showing plainly, we think, that in requiring uniformity, congress had reference only to the state, territory, county, town, or city, wherever the shareholder might reside, in the state or territory where the bank is located, that if the bank should be located in a city, the state or territorial and the county and city assessment should not be at a greater rate in the state or territory, county and city, than is assessed in the same state or territory, county and city, on other moneyed capital in the hands of individual citizens of that city or county, provided, that such shareholder resided in the state where the bank was located.

Congress did not intend that the tax on shares of stock held by a resident of Owyhee or Boise county, should pay just the same taxes that the shareholder in Ada county pays. All that the currency act and its amendment require is that the assessment shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of said county or other municipality, where such shareholder may reside, in the state where such bank is located. When congress conferred upon the legislature of Idaho territory the power over all rightful subjects of legislation, congress knew as well then as now that even the

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territorial government must be carried on in part by taxing the property within the territory; that the territorial government they had established required the organization of counties, towns, and cities, whose governments must be sustained by a tax upon the property within them; and also knowing that the wants, necessities, and expenses of these different municipalities could not be uniform, congress could have had no intention to require that such municipal taxation should be uniform throughout the territory or the state.

We will now consider the point passed over, which we regard as the decisive point in this case, and which is the last point necessary to be considered by the court, and that is, does the revenue act of Idaho territory, that was in force when these taxes were assessed, authorize the assessor to assess the shares of national bank stock in the hands of individuals or bodies corporate in name? We think not. We also think that the territorial taxation of those shares, under the legislation of congress, is lawful whenever the legislature pass such laws as authorize the territory to do so. (*Van Allen v. The Assessor*, 3 Wall. 573.)

Congress organized the system of national banks, and in the absence of express inhibition, possessed the right to surround that system with all the necessary safeguards to protect such banks and their shareholders in future; and if congress sees fit, as it has done, to regulate the taxing power of the states over these institutions, that exercise is not to be questioned; because, by the terms of the federal constitution, "the laws of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." The national currency act of 1864 provides that nothing contained in that act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of said person or corporation in the assessment of taxes, imposed by or under state authority, at the place where such bank is located, and not elsewhere; but not at

a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state. This must be regarded as the regulation of a taxing power that existed in the states, and by the law of congress in the territory of Idaho, prior to the currency law of June, 1864. If said provisions of said forty-first section of the national currency act aforesaid are mere regulations of the taxing power, then the local law must conform to the law of congress upon that subject.

For the purpose of ascertaining the authority given to tax the shares in question, as provided by congress, we must first examine our organic act, and the laws enacted by our legislature under that act.

Section 6 of the organic act for Idaho territory provides, among other things, as before stated: "That the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States, and provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands and property of residents." These are the only inhibitions in the organic act that in any way reach the legislative power upon the question of taxation. This is virtually leaving all other power of taxation, not prohibited by the organic act, with the territorial legislature.

From all these various laws, from time to time passed by congress, we think there is no doubt it was the intention to confer upon the territorial legislature the power to tax the shares in the hands of individuals or bodies corporate of national banks; but we think the tax imposed must be upon the shares in name, and that it is unsafe to attempt to tax them in any other manner. *Eo nomine et numero.*

As to the last proviso, in the forty-first section of the national currency law, it is sufficient to say, there is no other bank in the territory excepting the first national bank of Idaho, at Boise city; therefore, no unfair discrimination is possible between this bank and any other bank in the

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territory. We are of the opinion, that the laws of Congress authorize legislation in this territory for the purpose of taxing the shares of national banks, in the hands of individuals and bodies corporate.

We will now examine the statutes of Idaho and see if our revenue laws furnish sufficient authority for assessing the shares in the hands of the defendant. The last part of section 5 of the revenue law then in force, chapter 1, on page 20 of the fifth session laws, is the law relied upon by the counsel against the demurrer and in support of the tax. That part of the section relied upon reads as follows, viz.: "All capital loaned, invested, or employed in any trade, commerce, or business whatever; the capital stock of all corporations, companies, associations, firms, or individuals doing business or having an office in the territory; the money, property, and effects of every kind, except real estate, of all banks, banking institutions or firms, bankers, money-lenders, and brokers," may be assessed.

Section 1 provides an annual *ad valorem* tax of eighty cents upon each one hundred dollars value of taxable property for territorial purposes; and the same section 4, said revenue act, provides, that upon the same property the board of commissioners from each county is also hereby authorized and empowered to levy and collect, annually, a tax for county expenditures, not exceeding one hundred and fifty cents on each one hundred dollars; and upon the same property a further special tax may be levied to meet purposes under the laws of this territory.

The revenue law contains six hundred and eighty-nine sections; but that part of section 5 above set out, comes nearer authorizing the assessment and taxation of shares of stock in the hands of individuals than any other portion of the revenue law. We are unable to say, after examining these laws, with as much care as possible, under all the circumstances, that there is any law in Idaho territory that authorizes the assessment or taxation of national bank shares where the bank is located in the territory.

It will probably not be denied that personal property of the nature of bank shares ordinarily follows the *situs* of the

Points decided.

owner, that it is usually situated where the owner resides. We think that under the ordinary rule, this description of property, in the absence of statutory provision, would be deemed to be situated where the owner resided. Congress, however, in the forty-first section of the national currency law of June, 1864, did assign to the shares in these national associations a *situs* for the purpose of taxation. That *situs* of the shares in said national associations, by the act construing said section, approved February 10, 1868, is fixed within the state where the bank is located, and in the case before us, within the territory of Idaho. And by the proviso of the amending act aforesaid, it is provided: "That the shares of any national bank owned by non-residents of any state in the city or town where said bank is located, and not elsewhere." We think the territorial legislation does not sufficiently conform to the laws of congress, and that the defendant's demurrer should be sustained.

We think this point raised by the demurrer, and lastly considered by the court, is well taken, and for that reason the judgment of the district court is affirmed.

J. B. TAYLOR, RESPONDENT, v. O. W. PETERSON, APPELLANT.

REFEREE.—The only order under which a referee can act, is the one duly made and entered of record before he enters upon his duties; to that he must look for his authority, and he can not go beyond it.

AMENDMENTS.—An order appointing a referee may not be amended against objections, after such referee has acted, so as to make valid acts not authorized by the original order appointing him and prescribing his duties.

EXCEPTIONS.—If a party take no exception to an order of court confirming the report of a referee, he is not in a condition to urge objections to such order in this court.

IDEM.—Exceptions must be taken to an order overruling a new trial, and preserved in the record, if a party wish to avail himself of the error in the appellate court.

FINDINGS—STATEMENT—REVIEW—EXCEPTIONS.—This court will not look into a statement with a view to determine therefrom whether the evidence will support the findings or judgment, unless the party has placed himself in a position to object to the order of the court overruling a mo-

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tion for a new trial by proper exceptions, and further than it will where no appeal has been taken from such order.

INTEREST.—In the absence of an agreement to pay interest, and of any accounting between the parties, interest does not run, as a general rule.

APPEAL from the district court of the second judicial district, Boise county.

Prickett & Hasbrouck, and J. Brumback, for the appellant.

J. W. Huston, for the respondent.

HOLLISTER, J., delivered the opinion, WHITSON, J., concurring specially. NOGGLE, C. J., dissented.

This was a complaint filed in equity by the respondent against the appellant in the district court of Boise county, in which it was alleged that he and the appellant formed a copartnership on the twenty-fifth day of June, 1867, for the purpose of manufacturing and selling lumber at Idaho city, under the firm name of Taylor & Peterson, and that from thence until the twenty-second day of March, 1869, they conducted their business, when the active operations of the partnership ceased. By the terms of the partnership agreement each partner was to contribute equally to the partnership stock and property, and the two were to share in equal moieties the profits, and to bear equally any losses in their partnership business. The stock and property contributed by both partners consisted of certain real estate and a steam sawmill with its fixtures, etc., together with some logs and lumber then on hand.

The complaint alleges that after a certain period (before which the firm had in its employ a clerk who kept the books of account) the appellant undertook and agreed to keep the books of the firm, and to keep and render full, fair, and true accounts of its transactions and of all moneys received and paid out on the firm account, and that he did thereafter keep the books of the firm, and during the existence of the partnership, and since, received in charge and custody the moneys belonging to said firm. The complaint further alleges that the appellant did not keep correct, full, or true accounts of the moneys and business transactions of the

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partnership, but, on the contrary, and with intent to defraud the respondent, had kept imperfect, false, and fraudulent accounts thereof, and had converted the partnership moneys and assets to his own private use, by means whereof the respondent had been defrauded of his just rights. The complaint calls for an accounting, and prays for such other and further relief as may be necessary and just. An answer was put in denying the material allegations of the complaint, to which there was a replication, on which the issues were formed, for trial. On the third day of July, 1872, it being the third judicial day of the term, the court ordered that the case be referred to Jonas W. Brown, Esq., to take the proofs, and that the hearing of the cause should be had upon such day of the term as the court should appoint. On the twenty-second day of July the report of Mr. Brown was received, containing the proofs, and also his findings of fact and of the law arising therefrom. The appellant objected to the receiving and considering the report on various grounds, and particularly on the ground that under the order referring the case to the referee he had no authority to find the facts nor his conclusions of law.

On the twenty-seventh of July the cause came on to be heard upon the objections, and the court, after considering the same, found that the entry of the order of reference made on the third day of July was defective in not stating that the referee was appointed to report the conclusions of law as well as the facts in the cause, and ordered that said entry be amended *nunc pro tunc*, so as to show that he was appointed to report the conclusions of law as well as of facts found in said cause, and that the objections taken thereto be overruled. To this order the appellant took his exceptions in due form.

On the same day the cause came on to be heard upon the exceptions taken by the appellant to the report, and after argument, the court took the same under advisement until the third day of August, the same being the eleventh day of the term, on which day the court overruled the exceptions and ordered that a decree should be entered for the recovery by the respondent of the appellant of the sum of five thou-

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sand nine hundred and nineteen dollars and ninety-five cents, and costs of suit taxed at four hundred and three dollars and ninety-five cents.

Thereupon the appellant entered his motion for a new trial upon the following grounds, viz.:

1. Error in law occurring at the trial and excepted to by him, as follows: Error in law in overruling the objections to the report of the referee. Error in law in overruling the exceptions to said report.

2. For errors in law apparent upon the face of the papers, record, and proceedings in the suit.

3. Insufficiency of the evidence to justify the findings of the referee or the judgment.

It is undoubtedly the law that the only order under which a referee can act is the one duly made and entered of record before he enters upon his duties. To this he must look for his authority, and he can not go beyond it and take upon himself any duty with which it has not charged him. Should he do so, his acts are of no more binding force in law than are those of a private individual, and all parties who are sought to be bound by them may regard them as of no validity. Nor can such acts be made valid by any subsequent order of a court made against the objections of a party after the referee has completed his work. In this case, the report was in and the facts and conclusions of law were found by the referee before the original order under which he acted was amended. In amending the order, therefore, under such circumstances, we think the court erred, but we do not deem it such an error as to require us to send the case back for correction in the court below.

On an inspection of the decree it will be seen that the judgment of the court was founded upon the proof reported; and though it is apparent the court took into consideration the findings of the referee, yet it does not seem clear that they were considered in any other light than merely as advisory.

We are not disposed to consider the objections to the report as well founded. It is not pretended that it was erroneous in every respect. Certainly the erroneous findings

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did not render it so, nor did any error in receiving and reporting improper testimony render the unobjectionable portions bad. The objections went to the entire report, and some portions being good, the court could not, without doing injustice, throw them out simply because other portions were objectionable.

As the appellant took no exceptions to the action of the court in overruling his exceptions to the report of the referee, he is not in a condition to urge his objections thereto in this court. His failure to do so must be considered as a waiver of his objections and an acquiescence in the ruling of the court. The appellant is in the same condition as to the order of the court in overruling his motion for a new trial. Exceptions must be taken to an order overruling a motion for a new trial and preserved in the record, if a party wish to avail himself of the error in the appellate court. (*Scott v. Cook*, 1 Or. 24; *Boyle v. Levings*, 28 Ill. 314.)

In this case, the appellant failed to do so, and his failure precludes him from urging his objections here. Nor can he for the same reason object to the decree of the court on the ground of the insufficiency of the findings of the referee, or of the evidence, to justify the judgment. This court will not look into a statement with a view to determine therefrom whether such evidence will support the findings or the judgment unless a party has placed himself in a position to object to the order of the court, overruling a motion for a new trial, by proper exceptions, any further than it will where no appeal has been taken from such order. In the absence of any exceptions thereto, we must treat the question as though no appeal had been taken from such order, and in such a case, the statement serves no purpose but to point out such errors as may have intervened during the progress of the trial.

As no specific objection was made to the decree on the ground that it could not be supported by the pleadings, we are left to determine the question, unaided by the views of counsel. As nothing but the general statement, that a new trial should be awarded because of the errors of law apparent upon the face of the papers, record, and proceedings

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in the suit, has been made on this point, and this only in connection with the ruling of the court on the motion for a new trial, we might dispose of it in the same manner as we have the latter. The proper practice is for the party urging such objection to move in arrest of judgment after the motion for a new trial has been disposed of. Such a motion is the only legitimate one that can be made, where a party has not made a case in his pleadings that will support a judgment in his favor. In this way the attention of the court is called to the defective pleadings, and opportunity given to determine their sufficiency.

We think the appellant should have entered such motion, and had the ruling of the court upon it, so that such ruling could be brought here for review. However this may be, we hold that in this case, the respondent laid a sufficient foundation in his complaint for the judgment that was rendered in his favor, for he asked for an accounting and for general relief.

It was shown by the proofs that the appellant had drawn out a large amount of the profits of the partnership business in excess of his share—for his private use, that the firm owed little less than one hundred dollars—that the active operations of the firm had ceased, and that for all practical purposes with the exception of the above outstanding debts and some uncollectible accounts due the firm, the partnership was dissolved, and that there should be a final winding up of its affairs, and an adjustment of the unsettled matters between the parties. In such a condition of things it does not seem equitable that one of the partners should be permitted to have the control of the assets for the purpose of winding up the business, when its effect would be injurious to the interests of the other, and without benefit to the partnership interests. This showing of facts came properly in to the support of the prayer for an accounting and for general relief, and justified the court in its final action. We think the form of the complaint, and its sufficiency, well enough for the purpose.

In the case of *Miller v. Lord*, 11 Pick. 10, it was held by the supreme court of Massachusetts, on a bill filed by one

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partner against another, to compel him to account, that it is sufficient to pray in substance that he may be held to account—that such a prayer includes something more than barely to state an account; and that a party bound to account is bound thereby to pay any balance that may be found due. This we consider sound doctrine and applicable to the case at bar.

In making up the decree, the court allowed the respondent interest on the sum found due from October 21, 1870, to the date of the report, amounting to eight hundred and eighty-one dollars and seventy-nine cents. This we think was erroneous. There was no agreement between the partners that interest should be charged upon such share of the profits as each should draw out for his private use. In the absence of such an agreement, and of any accounting between the partners, interest does not run as a general rule. This error can be corrected here, however, by such a modification of the judgment as will exclude such interest, and this being so, the cause will not be remanded.

It is therefore adjudged that the judgment of the court below be reversed, and that respondent have judgment here for the sum of five thousand and thirty-eight dollars and sixteen cents, together with interest thereon at ten per cent. from the date of the entry of the judgment below. It is further adjudged that the order of the court below overruling the motion for a new trial, be affirmed, and that the respondent pay the costs of the proceedings in this court.

WHITSON, J. While I concur in most of the views expressed by Justice Hollister in the foregoing opinion, I feel it my duty to dissent from the opinion on some of the questions involved.

The order entered by the court below, *nunc pro tunc*, was, in my opinion, just such an order as was warranted by the facts in the case. It is a well-established principle, that a court has complete control of its records in a cause until a final determination thereof, and that the court has full and complete power to make the record conform to the facts during the progress of the trial or proceedings. The

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record is no part of the action of the court, but only the evidence of such action, and when parties to a suit understand what the action of the court is, and are controlled by it, it is then too late to object that the record fails to show that a certain fact existed, when they do not deny its existence, but, on the other hand, acted in accordance with the direction of the court, before discovering that the evidence of such direction was wanting.

In this case it is not contended that the record of the order *nunc pro tunc* falsifies the facts, but that, as the record did not show the authority of the referee to find the facts and conclusions of law, but simply to take the proofs, he had no right to go farther than the record warranted. The record shows that the defendant recognized the right of the referee to make findings of fact and conclusions of law from the proofs; for, by his attorneys, he appeared before the referee and argued the case without ever raising any objection to the authority of the referee to find the facts and law from the proofs, and it was only when the referee had reported against him that he objected. If, however, the referee transcended his authority by going too far, did not the defendant, by appearing before the referee and arguing the case, thereby consent to the referee deducing the facts and law from the proofs? It is not a jurisdictional question for the court, aside from doing what it in fact did do, had an undoubted right to do.

The defendant did not, and did not in the court below, claim that he was taken by surprise, or that the referee, in point of fact, was not, by order of the court, authorized to do just what he did. After the defendant had proceeded in the case, as though the record showed the authority of the referee to do all he did do, did not the defendant by that action cure the record, even without any order of court *nunc pro tunc*? I think he did, and that such assent was as binding on him as if he had agreed, in writing, to the reference under section 182 of the civil practice act. Did not the defendant, by his objection to the report, attempt, not only to vitiate what he himself had consented to and helped to bring about, but also to annul an order of court,

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which in fact, and which he did not deny, had been made, but which by a mere inadvertence had not been entered by the clerk. It seems to me that the defendant was doubly bound by the report, so far as the authority of the referee went, to do that which was objected to.

Another point upon which I feel impelled to differ from the opinion, is the question of interest. The defendant in this case was the book-keeper of the firm as well as a partner of the plaintiff, and as such was intrusted with the receiving and disbursing of all the moneys of the firm. The account between plaintiff and defendant was not an open, mutual, and current account, where each was presumed to keep his own account, and one in which it was necessary for the parties to come together and have a full and complete settlement, in order to determine the balance between them. The amount due the plaintiff depended entirely upon the books kept by the defendant, and he knew, or must be presumed to have known, when the active operations of the firm ceased, what amount was due his partner; and it being his duty to pay over such an amount as was due, he ought, I think, to be made to pay interest thereon.

It appears that there was a large amount due the respondent, at the time when the active operations of the firm ceased, and this too, from the books kept by the appellant, which must be regarded as his own admission of that fact. What settlement then was necessary? The defendant admitted in writing that there was a large amount due the plaintiff, and although he denied in the suit that any amount was due, the court found that his own books admitted it, and gave a decree accordingly.

This case is not similar to one in which there are transactions between two persons not united in business, and each of whom is presumed to keep an account of the transactions, and in which it would be necessary to compare books and accounts with one another, but a case in which it is conceded that one individual member of the firm was intrusted with keeping all the accounts and money, and who could know at any time the state of the business and the amount due each partner.

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The money received by the defendant was not a loan from the plaintiff, as in ordinary transactions between individuals, but simply money received by him in a fiduciary capacity, and a failure on his part to pay the plaintiff his share was a conversion of the plaintiff's money to his, the defendant's, own use. I have yet to find a single case in which the wrongful conversion of money or property has not subjected the wrong-doer to pay for his wrongful act. The case of *Reid v. Rensselaer Glass Factory*, 3 Cow. 436, bears upon this case.

There is still another point upon which I can not agree with my learned associate, and that is, as to the reversal of the judgment below. I do not think that because the court below gave too large an amount, the judgment should be reversed.

Section 293 of the civil practice act provides that "upon an appeal from a final judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from." If the judgment of the court below was too large to the amount of the interest which the court allowed, then it is certainly a proper case for modification, and the judgment should not be reversed, but modified.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

JANUARY TERM, 1874.

PRESENT:

HON. DAVID NOGGLE, CHIEF JUSTICE.

HON. W. C. WHITSON, } JUSTICES.
HON. M. E. HOLLISTER, }

JAMES PICKETT, PLAINTIFF IN ERROR, *v.* THE UNITED STATES, DEFENDANT IN ERROR.

TERRITORIAL COURTS.—The district courts of the territory are not United States courts, but territorial courts with the jurisdiction of the circuit and district courts of the United States, conferred upon them by law.

JURISDICTION—SUBJECT-MATTER.—It must be determined from the subject-matter of the action, and not from the title of the court, whether the action is one arising under the laws of the United States or of the territory.

PREJUDICE—CRIMINAL LAW.—No matter of form, not tending to the prejudice of the defendant in a criminal case, will be regarded.

INDIAN TRIBES—TRADE AND INTERCOURSE.—It was by virtue of the act of congress of June 5, 1850, and not the act of June 30, 1834, that the law regulating trade and intercourse with the Indian tribes east of the Rocky mountains, or such provisions of the same as were applicable, were extended over the Indian tribes of Oregon.

INDIANS.—The act of congress organizing the territory of Oregon, reserved to the government of the United States the right to make any regulations respecting the person and property of the Indians, which it would have been competent for the government to make had the act never been passed.

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IDEM.—This territory having been originally a portion of Oregon, and congress, in organizing it, having reserved the right to make such regulations respecting the persons and property of the Indians, as in the organization of Oregon territory, the act of 1850, and the provisions of the act of 1834, so far as applicable, remain in force in this territory.

INDIANS—INDIAN TRIBES.—The provisions of the twenty-fifth section of the act of congress of 1834, regulating trade and intercourse with the Indians, is as applicable to the Indian tribes in this territory as any portion of the act; hence, the territory of Idaho is Indian country, but only so far as the rights of the persons and property of the Indian tribes are concerned, and therefore, to that extent, within the sole and exclusive jurisdiction of the United States.

ERROR to the district court of the first judicial district.

Alanson Smith, for the plaintiff in error.

J. W. Huston, *United States district attorney*, for the respondent.

WHITSON, J., delivered the opinion. NOGGLE, C. J., and HOLLISTER, J., concurred.

James Pickett was indicted, tried, and convicted at the May term, 1873, of the district court of the first judicial district of the territory, held in Nez Perce county, for the murder of an Indian woman of the Nez Perce tribe, committed in Shoshone county, and upon such conviction was sentenced to suffer the extreme penalty of the law. Defendant now brings his writ of error to this court, and alleges as error committed by the court below: 1. That there is no such court as "the district court of the United States of America for the first judicial district of Idaho territory." 2. That the defendant was amenable to the laws of the territory, and not to the laws of the United States.

None of these questions were raised in the court below and no exception of any kind taken to any action of the court in the trial of the case. By the ninth section of the organic act of the territory (12 U. S. Stat. at Large, page 808), it is provided that the territory shall be divided into three judicial districts and that a district court shall be held in each of said districts; and throughout the whole of that section, and in fact the whole of the acts of congress on the subject, these courts are designated as district courts of the

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territory, so that we feel warranted in designating them as the “district courts of the territory.” We think that in all cases where these courts are exercising their jurisdiction as circuit or district courts of the United States, it is sufficient to lay the venue substantially thus: “In the district court of the judicial district of Idaho territory.” And when exercising jurisdiction in cases arising under the laws of the territory, it is proper to lay the venue thus: “In the district court of Idaho territory, in and for ——— county.”

In the case at bar the United States district attorney laid the venue in the indictment, substantially as designated by the first form, except that he inserted “the United States of America,” making it read: “In the district court of the United States of America, for the first judicial district of Idaho territory,” which insertion was entirely unnecessary, and can be treated as nothing more serious than mere surplusage, and could indicate nothing further than that the district court was sitting upon the business of the United States, which is more properly deduced from the subject-matter of an action, than from any title or mere name given to the court.

The only difference in the title of the court when acting in cases arising under the laws of the United States and those of the territory is, that in the former it is not essential to state the county, as the court sits in but one place in each judicial district; while in the latter, the court must sit in the proper county. (See Acts of Congress, 11 U. S. Stat. at Large, p. 49, sec. 5; 12 Id., p. 811, sec. 9; 11 Id., p. 366; also 2 Sess. Laws of I. T., p. 83, title 2, and amendments thereto. Also Act of Congress, 14 U. S. Stat. at Large, p. 427, sec. 1.)

The district courts of the territory are not United States courts, but territorial courts, having the jurisdiction of the circuit and district courts of the United States conferred upon them. This, however, is not a jurisdictional question, there being nothing wanting to determine what court was taking jurisdiction of the offense charged against the defendant. The objection we have been considering does not proceed upon the ground that a definite and given court had

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no jurisdiction, but upon the converse proposition that an indefinite and uncertain court has taken jurisdiction of a definite and certain offense. The title of the court was only a matter of form, which could in no way have prejudiced the defendant in his rights, and his objection raised here for the first time comes too late. (17 U. S. Stat. at Large, p. 198, sec. 8.)

The consideration of the second objection involves a question of great importance, not only as an abstract proposition, but also as upon its solution depends the life of the defendant, than which no more serious question can arise in any court for decision.

We find the question entirely new, and therefore are not aided by the decision of any of the learned courts which usually furnish precedents for the determination of most of the questions presented for our determination, except so far as we have been able to glean some light by analogy.

By the first section of the act of congress of June 30, 1834 (4 U. S. Stat. 729), it is provided, that all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana or the territory of Arkansas, for the purposes of this act shall be taken and deemed to be Indian country. The supreme court of the United States in giving an interpretation to this section says: "The Indian territory is admitted to compose a part of the United States." (*Cherokee Nation v. Georgia*, 5 Pet. 171.) "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union. (*Worcester v. Georgia*, 6 Id. 547.) "They are not foreign but domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases." (*Cherokee Nation v. Georgia*, 5 Id. 171.) By the twenty-fourth section of the same act it is provided that, "for the sole purpose of carrying this act into effect, all that part of the Indian country west of the Mississippi river, that is bounded north by the north line

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of the lands assigned to the Osage tribe of Indians produced east to the state of Missouri, west by the Mexican possessions, south by Red river, and east by the west line of the territory of Arkansas and the state of Missouri, shall be, and hereby is, annexed to the territory of Arkansas; and that for the purpose aforesaid, the residue of the Indian country west of the said Mississippi river shall be, and hereby is, annexed to the judicial district of Missouri."

* * * * *

By the twenty-fifth section of the same act it is provided, that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country; provided, the same shall not extend to crimes committed by one Indian against the person or property of another Indian. At the time of the passage of the act of 1834, none of the country which was subsequently organized into the territory of Oregon was embraced by the provisions of this act within the Indian country, it being at that time jointly occupied by the United States and Great Britain. By the act of congress organizing the territory of Oregon (9 U. S. Stat. at Large, p. 323), it is provided among other things: "That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to effect the authority of the government of the United States to make any regulation respecting such Indians, their lands, or other rights by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed."

It might be pertinent just here to inquire, what were the rights of the Indians as to their persons and property when this act was passed, and what power would the general government have possessed relative thereto, had this act never been passed? The answer seems almost unnecessary. There can be no doubt that the power of congress in the premises remained untrammelled. Congress did legislate

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upon the subject subsequently, and by the act of June 5, 1850, 9 U. S. Stat. at Large 437, sec. 5, made the following provision: "That the law regulating trade and intercourse with the Indian tribes east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the territory of Oregon." The territory of Washington was subsequently organized out of a portion of Oregon, and the exact provision inserted in her organic act as that of Oregon respecting the authority of the United States relative to the Indians.

In 1855 a treaty was made with the Nez Perce tribe of Indians residing within the then territories of Oregon and Washington, and ratified in 1859, by the provisions of which they were to be restricted in their rights to a reservation within the limits of Washington territory, with the following exception: "The exclusive right of taking fish in all the streams when running through or bordering said reservation, is further secured to said Indians, as also the right of taking fish at all usual and accustomed places in common with the citizens of the territory, and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle, upon any unclaimed lands." The tribe also acknowledged their dependence upon the government of the United States, and promise to be friendly, etc.

In 1863 a supplemental treaty was made with the Nez Perce tribe of Indians, by article 8 of which it is provided as follows: "It is also understood that the aforesaid tribe do hereby renew their acknowledgments of dependence upon the government of the United States, their promises of friendship and other pledges, as set forth in the eighth article of the treaty of June 11, 1855, and further, that all the provisions of said treaty which are not abrogated or specifically changed by any article herein contained, shall remain the same, to all intents and purposes, as formerly, the same obligations resting upon the United States, the same privileges continuing to the Indians outside of the reservation, and the same rights secured to citizens of the United States as to right of way upon the streams, and

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over the roads, which may run through said reservation as therein set forth.”

The organic act of Idaho territory was passed by congress in 1863, embracing within its limits that portion of Washington territory upon which was located the Nez Perce reservation, and that portion of the act respecting the rights of the Indians is much broader and stronger in favor of the authority of the general government in the premises than were the organic acts of Oregon and Washington territories. The act provides “that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Idaho, until said tribe shall signify their assent to the president of the United States, to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise which it would have been competent for the government to make if this act had never passed.”

After a thus lengthy quotation from the acts of congress upon the subject of the rights of the Indians within the territory, we come now to consider wherein the United States have at any time surrendered their authority over the persons and property of the Indian tribes located within this territory. The intercourse act, as will be seen, was extended over the Indian tribes of Oregon so far as applicable.

And here arises the question as to what provisions of the intercourse act were applicable to the existing state of affairs in Oregon at the time its provisions were extended over that territory. It can not be questioned but that it

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was as necessary to extend the provisions of the twenty-fifth section of the act of 1834 over the Indian tribes of the territory as any portion of the act, and if so, that country, so far as the rights of the Indian tribes were concerned, were applicable; and the country, as affecting their rights of person and property, was Indian country. And why not? The whole country was inhabited by wild and barbarous savages, and was in point of fact, if not in point of law, Indian country; and could there be anything inapplicable in extending its provisions over Oregon, so far as Indian tribes might be affected in their rights of person or property? The very condition of the country suggests the reasonableness of the intention of congress to that end.

But it could not be applicable to the whites, in their intercourse with one another; for while it has been the policy of the government, almost from its very inception, to control as well as protect the Indian tribes, it has also been its policy to open up this vast extent of country to settlement by the whites. Therefore we are led to the conclusion, inevitably, we think, that, so far as affecting the rights of person and property of Indians, it is Indian country, and to that extent within the sole and exclusive jurisdiction of the United States; and if so, all the laws of the United States providing for the punishment of crimes within such sole and exclusive jurisdiction are clearly applicable.

The policy of the general government, in dealing with the Indians, has not been moderated in favor of Indian supremacy, if we may use such a term, but rather to the other extent, of treating them as a dependent race, incapable of and unwilling, to a great extent, to avail themselves of the advantages of civilization and progress. In all the details of their relations to the government, their rights and interests are made subservient to the interests of the government and its citizens; and they are, to every practical purpose, to the government, what the ward is to the guardian. Where, then, is there any inapplicability in trying all those rights affecting the persons or property of the Indians, who have tribal relations, on the United States side of the court? To us, such a course seems to be dictated by the

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whole letter and spirit of the laws of congress upon this subject.

In this way the adjudication of these rights is further removed from the influence of those local prejudices which often, whether justly or not, exist against the Indians.

All the officers of the courts are the appointees of the United States, and by reason of this are supposed to reflect the will of the government in dealing with this much-perplexed question.

Judgment of the court below affirmed.

THE PEOPLE, APPELLANTS, v. ALBERT HEED, RESPONDENT.

CRIMINAL LAW—FORGERY.—If the original instrument alleged to have been forged or counterfeited, is void upon its face, an indictment for forgery will not lie for counterfeiting such instrument.

APPEAL from the district court of the second judicial district, Ada county. The defendant, being indicted for forgery, demurred to the indictment. The district court sustained the demurrer and rendered judgment of dismissal. The plaintiff appealed.

F. E. Ensign, district attorney, for the appellants.

Huston & Gray, and Clitus Barbour, for the respondent.

NOGGLE, C. J., delivered the opinion. WHITSON and HOLLISTER, JJ., concurred.

In this case the grand jury at the last November term of the district court for Ada county charged the defendant Heed with the crime of forgery, as follows, to wit: That the said defendant did, on the eighteenth day of August, A. D. 1872, at the county of Ada aforesaid, make, forge, and counterfeit an Ada county warrant for the sum of one hundred and seventy-five dollars, thereby intending fraudulently, feloniously, and falsely to defraud said county out of said sum of one hundred and seventy-five dollars,

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and that he also, in like manner, and at the time aforesaid, forged the indorsement on said warrant for the like purpose. And by a second charge the said grand jury, in the same indictment, charge the said defendant with the crime of forgery, thereby intending to damage and defraud one James I. Crutcher, as follows, to wit: That he did, at the same time and place, feloniously, fraudulently, and falsely make, forge, and counterfeit the said indorsement thereon.

On the twenty-sixth day of November, 1873, the said Heed, the defendant, being in court, waived the service of process, and, after hearing the indictment read, he asked for time, until December 1, to plead to said indictment. On that day the said defendant appeared and demurred to said indictment, assigning several causes of demurrer, and among others the following, to wit: 4. "The instrument set out in the indictment does not purport to be a counterfeit of any original instrument, and that the instrument set out is a nullity, upon which no forgery or counterfeiting could be committed." We think this fourth ground of demurrer well taken, because, upon inspection of the county warrant said to be forged and counterfeited in this case, we find that it lacks the words "Issued on warrant No.—," not showing or pretending to show what county warrant this duplicate county warrant was issued upon. The number of the original county warrant upon which the duplicate county warrant mentioned in the indictment in this case was issued, does not appear upon the face of this duplicate warrant. Nor was it signed by the auditor. We can not see, therefore, how any party or person could be defrauded or damaged by such a county warrant.

The judgment of the district court in this case should be affirmed.

Judgment affirmed.

Opinion of the Court—Hollister, J.

R. B. AND E. M. REED, RESPONDENTS, v. C. H. SMITH,
APPELLANT.

LIMITATIONS, STATUTE OF—ACCOUNT STATED.—To take a case out of the statute of limitations on an account stated, the acknowledgment of the debt, or the promise to pay it must be in writing, signed by the party to be charged thereby; and this, whether the original cause of action was or was not barred at the time of the acknowledgment or promise.

IDEM.—The stating of an account is in the nature of a new promise, depending for its validity upon the consideration of the old debt; but the evidence of such promise must be in writing, or the action will be barred by the statute of limitations.

APPEAL from the district court of the second judicial district, Ada county.

Prickett & Hasbrouck, for the appellant.

Huston & Gray, for the respondents.

HOLLISTER, J., delivered the opinion. WHITSON, J., concurred. NOGGLE, C. J., dissented.

This action was commenced on the second day of April, 1872, in the probate court of Ada county, in which the respondents had judgment, from which an appeal was taken by appellant to the district court of said county, where a judgment was rendered against him for the sum of three hundred and forty-four dollars and fifty-three cents, besides costs. This judgment included the sum of forty dollars and sixty-four cents on account of an interest accruing from the second day of December, 1870, to the second day of April, 1872. The action was upon an account stated.

An answer was put in to the complaint, acknowledging an indebtedness on the part of appellant in the sum of ninety dollars and eighty-one cents; and as to the residue a plea of the statute of limitations was interposed.

It appears from the evidence that in August, 1871, the parties came together, and on an accounting there was found due to the respondents the sum of three hundred and four dollars and eighty-five cents. The account between the parties commenced to run in November, 1869, and con-

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tinued until December, 1870, but all except ninety dollars and eighty cents had run over two years before the commencement of the action. There were no mutual accounts between the parties. The only question arising upon this state of facts is, whether, upon a verbal agreement by the debtor to pay the amount ascertained to be due, an action will lie, when the statute of limitations is interposed as a defense.

There is no doubt that at common law a parol admission or acknowledgment of the correctness of an account, and a promise to pay, would be sufficient to take the case out of the operation of the statute, where a suit is brought within the period of its limitation, though the original cause of action was barred by it. Our statute, however, has changed the rule on the subject. It is provided in section 30 of the act defining the time of commencing civil actions (1 Session Laws, 558), as follows: "No acknowledgment or promise shall be sufficient of a new and continuing contract, whereby to take the debt out of the operation of this statute, unless the same be contained in some writing, signed by the party sought to be charged thereby." This, we understand, is a copy of the statute of California, and nearly so, of what is generally called "Lord Tenterden's act," passed by the British parliament in 1829.

The stating of an account is in the nature of a new promise, depending for its validity upon the consideration of the old debt, and this promise, though resting in parol, would be good under the common law. Our statute, though not changing the character of the new undertaking, nor impairing its validity, has required written evidence to support it, when an action is brought upon it. Under the common law it was found that great mischief often resulted from the unsatisfactory nature of the proofs, and the difficulty of arriving at the truth by mere verbal testimony, and to prevent such mischief, and also to guard against fraud and perjury, the statute was enacted. The statute was a statute of repose, and under it the presumption arose that the debt had been paid, and to remove that presumption

Opinion of the Court—Hollister, J.

nothing short of the written acknowledgment or promise to pay, signed by the party sought to be charged thereby, would answer.

It has been urged that the law applies only to cases where the statute operates as a bar to an action brought upon the original liability, and that in cases like the present, a parol undertaking to pay is sufficient to remove the bar. In this view we are not prepared to concur. The case of *Weatherwax v. Cosumnes Mill Co.*, 17 Cal. 344, clearly supports our position. That was a case where the parties had an accounting before the old debt was barred; and yet it was held that the new undertaking must be in writing to charge the party in an action brought after the statute had barred the original debt. In *Barron v. Kennedy*, 17 Cal. 574, and *Fairbanks v. Dawson*, 9 Id. 89, it is decided that new promises must be evidenced by writing.

Lord Tenterden's act enacts, that in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new and continuing contract, whereby to take any case out of said enactments (the statute of James I. and the Irish act of limitations), or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." Under this statute it has been decided by the courts in England that the acknowledgment of the debt, or a promise to pay, must be in writing signed by the party sought to be charged thereby. (Ang. on Lim., sec. 274, p. 294.)

The conclusion, therefore, at which we have arrived from these authorities, and the act itself, is that the acknowledgment or promise to pay a debt which would otherwise be barred by the act of limitations must be in writing, signed by the party sought to be charged thereby, whether in cases where the original debt was not barred when the acknowledgment or promise was made, as in those cases where the statute had already run.

The judgment of the district court is reversed and re-

Opinion of the Court—Noggle, C. J.

manded, with directions to the district court to enter judgment in favor of respondents for the sum of ninety dollars and eighty-one cents, deducting costs expended by the appellants therefrom.

JORDAN W. HYDE, PLAINTIFF, *v.* H. O. HARKNESS,
DEFENDANT.

JURISDICTION—DISTRICT COURTS—INDIAN RESERVATION.—A district court has jurisdiction over Indian reservations in any organized county of this territory, and its process may run and be served there, if there be no treaty to the contrary with the Indians thereof.

CERTIFIED by the district court of the third judicial district, Oneida county.

J. W. Huston and F. E. Ensign, for the plaintiff.

L. P. Higbee, for the defendant.

NOGGLE, C. J., delivered the opinion. WHITSON and HOLISTER, JJ., concurred.

This is a case adjourned from the third judicial district, Oneida county, Idaho territory, under section 326 of the civil practice act, page 142, of 2 Session Laws of the said territory, for the purpose of deciding the motion interposed by the defendant, which, after entitling the cause, is as follows:

“The said defendant, by L. P. Higbee, and Johnson and Hyndman, his attorneys, specially appearing for the purpose of this motion, and for none other, makes this, his special appearance, in the above entitled action, and thereupon moves the court to dismiss the suit herein, for that the service in said cause was not made by an officer, or in any place required by law, in this: that the said writ and copy of complaint were served on this defendant by one Morgan, sheriff of Oneida county, outside of and beyond the limits of his bailwick, viz., at the residence of this defendant, located and situated on the United States reservation, known as the Bannock or Fort Hall reservation, within the exclusive jurisdiction of the United States government,

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and without the boundaries and jurisdiction of said Oneida county.

Signed, L. P. HIGBEE and

“JOHNSON & HYNDMAN,

“Attorneys for defendant for the purpose of this motion only.”

Which motion is marked filed by the clerk of the court October 29, 1873. Afterwards the court adjourned said cause into the supreme court for a decision. After entitling said cause the district court says: “This cause came on regularly for a hearing on this fifth day of November, being still of the October term, 1873. Upon the motion of the defendant to dismiss this action for a want of legal service of summons, Jo. W. Huston and F. E. Ensign, Esqrs., appearing as attorneys for plaintiff, and E. P. Johnson and L. P. Higbee, Esqrs., appearing specially for defendant, only for the purposes of said motion; and the said parties plaintiff and defendant, by their said attorneys, having agreed and stipulated, for the purposes of said motion, in open court, that the service of the summons herein was made at the place, in the manner, and by the person set forth in the affidavit of H. O. Harkness filed herein; and it appearing to the court that the decision of said motion must turn upon important and doubtful principles of law; it is now hereby by the court ordered, by and with the consent of the parties aforesaid, by their attorneys aforesaid in open court signified and given, that this cause be, and is, hereby adjourned into the supreme court of said territory for the decision of said motion, according to the law and justice of the case.

“Signed,

M. E. HOLLISTER,

“Judge, etc.”

The only question made by this order and the motion of the defendant is, did the court for the purposes of this case have jurisdiction of the party served with process by the sheriff of the county on the Indian reservation mentioned in this case?

We are referred to 15 United States Statutes at Large, 673, 674, which contains the greater portion of a treaty with the Shoshone and Bannock tribes of Indians on the

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part of the United States; the second article of which is as follows, to wit:

Article II. It is agreed that whenever the Bannocks desire a reservation to be set apart for their use, or whenever the president of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port Neuf and Kansas (doubtless meaning Cammas) Prairie" countries, and that when this reservation is declared, the United States will secure to the Bannocks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency house and residence of agents, in proportion to their numbers as herein provided for the Shoshone reservation. The United States further agrees that the following district of country, to wit: Commencing at the mouth of Owl creek and running due south to the crest of the divide between the Sweetwater and Papo Agie rivers, thence along the crest of said divide and the summit of Wind river mountains to the longitude of north fork of Wind river, thence due north to mouth of said north fork, and up its channel to a point twenty miles above its mouth, thence in a straight line to headwaters of Owl creek, and along the middle of the channel of Owl creek to the place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing with the consent of the United States, to admit amongst them; and the United States solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians; and henceforth they will, and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States except such as is embraced within the limits aforesaid."

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This article gives to these tribes more extended privileges than any other portion of such treaty, and we can find nothing in the treaty from article I to article XIII inclusive, which sustains the doctrine that a white person may settle upon any portion of this reservation, and while there, be exempt from any of the duties he owes to his government or non-amenable to its process, no matter whether that process be municipal or otherwise, provided, such municipality includes within its limits such reservation.

From all the examination of the record in this case and the authorities to which we have been referred, we are of the opinion that this case should be remanded to the district court with instructions to overrule the defendant's motion and to proceed with the case as in other cases, and it is so ordained.

DAVID N. HYDE, APPELLANT, v. NICHOLAS LAMBERSON ET AL., RESPONDENTS.

LIMITATION—DEMURRER—BILLS OF REVIEW—PRACTICE.—The statute of limitations can not be set up by demurrer, and by analogy the same rule applies to the time within which bills of review are to be filed.

DISCRETION—BILLS OF REVIEW.—Leave to file a bill of review which seeks to correct an error not apparent upon the decree which it seeks to reverse, is within the discretion of the court.

PRACTICE—BILLS OF REVIEW.—After a defendant has demurred to a bill of review, he can not raise an objection to the right of the plaintiff to file it. To avail himself of such objection, he should move the court, on his first appearance, to strike the bill from the files, or to dismiss the suit.

APPEAL from the district court of the second judicial district, Ada county.

Prickett v. Hasbrouck, for the appellant.

J. Brumback, for the respondents.

HOLLISTER, J., delivered the opinion. WHITSON, J., concurred. NOGGLE, C. J., dissented.

The original bill, on which the decree which this proceeding seeks to correct, was filed in the district court of Ada county, on the nineteenth day of October, 1869, for the foreclosure of a mortgage executed by the defendant N.

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Lamberson to plaintiff, conveying to the plaintiff the west half and the north-east quarter of the north-east quarter of section 4, in Ada county, excepting, etc., and such proceedings were thereon had, that on the twentieth day of April, 1870, a decree was rendered by the court against Lamberson in favor of the plaintiff for the sum of one thousand and seventy-three dollars and eleven cents, and an order entered that the premises be sold.

On the ninth of May following, the clerk of the court issued an order to the sheriff for the sale of the premises, which was returned by order of plaintiffs' attorneys, without any sale, on the twenty-second day of the succeeding June. A mistake in the description of the premises thus conveyed and decreed to be sold, having been discovered after the decree had been enrolled, the plaintiff presented his petition to the court, duly verified, on the eleventh day of November, 1871, asking leave to file his bill of review, for the purpose of having the decree corrected so that it might conform to the description of the premises which the defendant, N. Lamberson, in and by his said mortgage, intended to convey. Of the time and place for presenting the petition, this defendant had due notice, and the court, on the eleventh day of November, 1871, after a full hearing of counsel on both sides, granted such leave. On the twelfth day of February following, the bill of review was filed. The defendant, Hull, who was made a party to the proceeding, failing to answer, was defaulted, and on the sixteenth of March, the defendant, N. Lamberson, put in his demurrer, denying in general terms the equities of the bill, and at the same time filed his answer, by which it was disclosed that since the decree in the original case was rendered, he had intermarried with the defendant, Hannah Lamberson, and that she had an interest in the subject-matter of the suit.

Exceptions were taken by the plaintiff to several portions of the answer, which were overruled by the court, and on leave given, he filed his amended bill, making the defendant, Hannah Lamberson, a party to the action. The amended bill contained the averments of mistake, etc., as stated in the original bill.

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On the tenth of October following, the defendant, N. Lamberson, entered his motion to strike the amended bill from the files, on the ground that it did not any longer purport to be a bill of review, but a new and independent action, to reform the contract and decree. On the same day he and the defendant, Hannah Lamberson, interposed their separate demurrers to the amended bill, and for cause, alleged that the same did not state facts sufficient to constitute a cause of action, which were sustained by the court, and a decree rendered dismissing the case and for the recovery of their costs. From this decree the cause comes here by appeal.

The bill of review as amended, distinctly alleges that the description of land actually conveyed by the mortgage and the decree for the sale of the land, were erroneous in this: that it was thus described as the west half and the north-east quarter of the north-east quarter of the section, when in truth and in fact, it was the intention of the parties that the west half and the north-east quarter of the south-east quarter of the section, should be conveyed. By these demurrers, it is claimed by defendant's counsel, the question was raised that the time within which the bill of review should be brought to reverse and reform the erroneous decree had barred the right, and that, accordingly, the amended bill should be dismissed. It is conceded that more than one year had elapsed after the discovery of the mistake before the bill was filed. It is undoubtedly the law that a bill of review to reverse a decree erroneous upon its face, by analogy to the time for taking appeals, must be filed within one year from its enrollment, and the same rule applies to a bill brought for the same purpose where the decree itself shows no error, but which error is afterwards discovered when the same period of time has elapsed after the error was discovered.

Before a bill for the latter cause can be filed, leave of the court must be obtained, and should leave be given and the bill filed, in such a case it would be an error which the defendant might have corrected, by proper proceedings for the purpose, in the appellate court. When, however, the court

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has given leave, it operates as a protection to the party filing the bill, and no advantage can be taken of the error by demurrer.

In overruling the motion for a new trial, and in deciding the demurrer to the amended bill, the counsel for defendant seemed to be of the opinion that because the petition had not been prevented and the bill filed within one year, after the discovery of the error, the irregularity was so fatal to the equities of the plaintiff, that a demurrer would reach it on that ground. In support of this view many authorities have been cited, all of which we have carefully considered, and among them is 10 Wheat. 152. In this case this question was fully considered, and the court say that a bill not filed within the prescribed period for error apparent on the face of the decree, should be dismissed for that reason; but as the bill was filed on leave of the court, it was the unanimous opinion of the judges, that they would give no opinion upon the question, but adjudged that the bill should be dismissed, but solely on the ground that it showed that the plaintiff was not entitled to the relief sought. The question in 16 Ves., jun., arose upon the application for leave to file the bill, and for that reason leave was denied. To the same effect is the rule as stated in 2 Daniell's Ch. Pr. and Pl. 1638, 1641. We have seen in none of the authorities to which our attention has been called any law which goes to show that a demurrer can raise this question. On the contrary the doctrine appears to be well settled, that after a bill has been filed, whether on leave of the court for error not apparent upon the decree, or without leave, when the error is apparent after the proper time has elapsed, it can not be dismissed except upon a motion entered for that purpose at the first appearance of the defendants.

In *Avery v. Phelps*, 17 Ves. 177, the lord chancellor says, leave of the court to file the bill gives protection. The supreme court of Illinois, in *Griggs v. Geer*, 2 Gil. 2, say: "Leave to file the bill rests in the discretion of the court; and that, after a defendant has demurred to a bill of review, he can not raise an objection to the right of the plaintiff to file it." This we believe to be the true rule, and as such

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we feel disposed to adopt it. It is urged that it is inequitable and unjust for the plaintiff to lie by for so great a length of time, because of the rapid accumulation of the interest on the debt at the high rate contracted to be paid.

It must be confessed that we are unable to understand the force of such an argument. So far as we have looked into equity cases, it has never been held that lenity shown by a creditor to one indebted to him, by extending the time for payment of the debt, was inequitable or unconscionable. In business circles and in law, it has always been considered as a favor to show indulgence in this manner. It was entirely within his power, and it became his legal and moral duty to pay the debt when due, and if he has failed to do so, he surely can not complain of the delay to collect it. It is objected that, instead of seeking relief in this form of action, he should have appealed from the decree complained of. The answer to this is obvious. There was nothing appearing upon the decree of the proceedings in the action which showed that any error had been committed. Only the record of the proceedings of the district court could have been brought under review in the supreme court, and no error appearing, the judgment must have been affirmed.

Upon the whole view of the case, we can come to no other conclusion from the authorities than that, by appearing and demurring to the amended bill, the defendants waived the objection that it was not filed in time, and that the judgment should be reversed and the cause remanded, and the defendants be permitted to answer to the merits of the bill.

Reversed.

**THOMAS MOOTRY ET AL., APPELLANTS, v. JAMES H.
HAWLEY ET AL., RESPONDENTS.**

EVIDENCE—CONFLICT—NEW TRIAL.—The appellate court will not disturb a judgment or verdict, or order denying a new trial, where there is a substantial conflict in the testimony, and no rule of law appears to have been violated.

APPEAL from the district court of the second judicial district, Boise county.

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Geo. Ainslie and Prickett & Hasbrouck, for the appellants.

Huston & Gray, for the respondents.

NOGGLE, C. J.

In this case the plaintiffs claim a certain gold mine known as a quartz lead, or lode, named the Lone Star lode, near the Gold hill quartz lode, in Boise county, Idaho territory, and the said plaintiffs have brought their ejectment suit, claiming the said lode, and to recover possession of the same from the defendants.

The defendants appeared on the thirty-first day of August, 1872, and answering, denied, upon information and belief, that plaintiffs and their grantors are now, or have been, for more than eight years last past, the owners of, or in the quiet, peaceable, and exclusive and undisturbed possession of that certain quartz lode or ledge, containing precious metals of gold and silver, known as the Lone Star ledge or lode, lying and being situated in Granite mining district, Boise county, Idaho territory, and more particularly described in plaintiffs' complaint, to which reference is here made. The defendants also, upon information and belief, deny that the so-called Lone Star ledge is worth the sum of fifty thousand dollars, or any sum whatever; they also deny that there is a large amount of gold-bearing quartz in said Lone Star ledge, or any amount whatever, and they deny that said Lone Star ledge contains any gold whatever. The defendants also deny that they have at any time or in any manner whatever, entered upon or taken possession of the said Lone Star lode, and ousted the plaintiffs therefrom; they also deny that they did, on the eighteenth day of June, 1872, or at any other time, enter upon, or in any manner take possession of said Lone Star lode, for the purpose of working thereon, or that they, in any manner, retain the possession of the same, from the said plaintiffs, for any purpose whatever. In short, the defendants deny every material allegation in said complaint, and in their answer the said defendants claim that the said plaintiffs had abandoned the same for more than one year, and that the plaintiffs, if they ever had owned, or were in the possession of any such

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ledge, they have long since forfeited all right thereto; and in conclusion the defendants aver, that the plaintiffs abandoned said Lone Star ledge more than three years prior to the commencement of this suit, and pray judgment for their costs, etc.; which answer is fully verified by Hawley, one of the defendants, and thus the issue was formed.

On the stand, as a witness, James H. Hawley claimed that, in the year 1869, he discovered a ledge crossing the West creek ditch, and, that in company with the other defendants, or their grantors, he located said ledge, in accordance with the quartz laws then in force, calling it the Iowa ledge, and that he caused it to be so recorded, staking it out and placing the necessary notice thereon, and doing thereon more than the required amount of labor in that and the next year; he also says that he again commenced work in 1871, on the Iowa ledge.

Thomas Mootry, one of the plaintiffs sworn on the part of the plaintiffs, testified that he knew the Lone Star, that he and others discovered that ledge on the twelfth of October, 1863, that he and the other defendants or their grantors, the discoverers, claimed fourteen hundred feet, being two hundred feet each, by location, and one claim by right of discovery, that they put up the notices and caused a due record of the same to be made in April, 1864, and otherwise contradicted the most of said Hawley's testimony. On the trial of said cause, both parties desired the jury to go and view the premises; after the jury did so, each party called about an equal number of witnesses to sustain his part of the case. On the trial all objections to evidence and questions of law were promptly decided in favor of plaintiffs, and both parties gave much evidence to sustain their views of the case, so that when said case closed, not a single exception had been taken therein, and so far as I know, or the record shows, not a single objection had been made on the part of the plaintiffs, so that we can not find a single question in the case which should reverse the judgment in this case.

For these reasons the judgment is affirmed.

WHITSON and HOLLISTER, JJ. We concur.

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THE PEOPLE, PLAINTIFFS, v. WILLIAM STEWART,
DEFENDANT.

LEGISLATIVE POWER—PARDON.—An act of the legislative assembly of the territory remitting the penalty imposed in a criminal action, duly approved by the governor, is equivalent to a pardon.

CERTIFIED by the district court of the second judicial district, Ada county. The defendant was convicted at the November term of the district court, 1871, of “assault and battery,” and thereupon adjudged to pay a fine and be imprisoned. From that judgment he appealed. At the January term of the supreme court, 1873, the appeal was dismissed and the cause remanded to the district court, to carry into effect its judgment. At the April term of the district court, 1873, the district attorney moved for a re-sentence, but before that time the act of the legislature, recited in the opinion, was passed.

F. E. Ensign, district attorney, for the people.

Huston & Gray, for the defendant.

NOGGLE, C. J.

In the second judicial district court of Idaho territory, on the third day of May, 1873, the said court then being in session, the Hon. F. E. Ensign filed in said court, a motion in the words and figures following, to wit (after entitling the said cause):

“Now comes the people, etc., by F. E. Ensign, district attorney, and moves the court to re-sentence the said defendant, William Stewart, for the offense of assault and battery, of which offense he was convicted on the twenty-sixth day of December, 1871, in said district court.

Signed,

F. E. ENSIGN,

“District Attorney of Third District.”

On the same day the said defendant placed on file, or caused the same to be done, the following act of the legislature, to wit:

“An act vacating a certain judgment rendered in the district court of the third judicial district of Idaho territory

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in and for Ada county, at the November term thereof, 1871.

“Be it enacted by the legislative assembly of Idaho territory as follows:

“Section 1. Whereas, it satisfactorily appears, that a judgment was entered at the November term, 1871, of the district court of the third judicial district of Idaho territory in and for Ada county, against William Stewart, upon his conviction of the offense of assault and battery; and whereas it further appears, that the said William Stewart had been previously convicted, sentenced, and punished by a court of competent jurisdiction, therefore the said judgment rendered against the said William Stewart at the said November term of the said district court, and the sentence rendered on the twenty-sixth day of December, 1871, upon said judgment are hereby vacated and annulled, and the fine and imprisonment thereby imposed are hereby remitted.

“This act to take effect from its passage. Passed the house of representatives this the tenth day of January, A. D. 1873. Signed,

S. S. FENN,

“Speaker of the House.

“Passed the Council this tenth day of January, A. D. 1873.

“Signed,

I. N. COSTON,

“President of the Council.

“Approved January 10, A. D. 1873.

“Signed, T. W. BENNETT, Governor.

Secretary's Office, Boise City, I. T., January, 14, 1873.

“I do hereby certify the foregoing to be a true and correct copy of the original now on file in my office.

“E. J. CURTIS, Secretary of Idaho.

“Indorsed, filed April 2, 1873.

“Signed, A. L. RICHARDSON, Clerk District Court.”

The said motion was overruled *pro forma*, and the questions of law involved therein being doubtful and unsettled, they were certified to this court, that the said questions might be determined therein, and after duly considering the following language of Chief Justice Marshall: “A pardon by act of parliament is more beneficial than by the king's

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charter, for a man is not bound to plead it, but the court must *ex officio* take notice of it, neither can he lose the benefit of it by his own laches or negligence as he may of the king's charter of pardon" (10 Curtis U. S. 435; 7 Pet. 150), we think that this case should be dismissed and that the defendant should be discharged.

HOLLISTER, J. I concur in the judgment on the ground that it is competent for the Legislature to pass a law remitting the punishment.

WHITSON, J. I dissent from the judgment on the ground that the record does not show that the act in question was judicially before the court by plea, motion, or otherwise. (*United States v. Wilson*, 7 Pet. 150.)

GEORGE LEGGETT, PLAINTIFF IN ERROR, v. ALBERT MEYERS, DEFENDANT IN ERROR.

PLEADING—DEMURRER—PROBATE COURT.—A demurrer is a proper pleading in the probate court.

ANSWER—DEMURRER—PLEADING.—When a defendant in an action demurs within ten days after service of summons upon him, he has answered within meaning of the statute; and no judgment for want of an answer can be rendered against him.

ERROR to the district court of the second judicial district, Ada county.

A. Heed, for the plaintiff in error.

Clitus Barbour, for the defendant in error.

WHITSON, J., delivered the opinion. HOLLISTER, J., concurred. NOGGLE, C. J., dissented.

This action was commenced in the probate court by Albert Meyers against George Leggett. Before the term of the court came regularly on, and within the time required to answer, the defendant filed a demurrer to plaintiff's complaint. When the term came, the defendant asked and obtained leave to withdraw his demurrer and file his answer, which was accordingly done. Thereupon, the plaintiff filed

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a motion for judgment for want of an answer, which motion, notwithstanding the leave given to file an answer, was allowed by the probate court, and judgment given accordingly. Defendant appealed to the district court of Ada county, and the judgment of the probate court was affirmed. Defendant now brings his writ of error to this court for a review of the judgment of the district court.

The second section of the act of the sixth session, "defining the jurisdiction and practice of the probate courts, etc., provides that the same "rule of practice shall be observed before the probate court as those governing the practice before justices' courts, except that the pleadings shall be in writing," etc. Section 588 of the civil practice act provides, that section 478 of the same act shall be applicable to justices' courts and actions therein, and that section provides that "a defendant shall be deemed to appear in an action when he answers, demurs, or gives the plaintiff written notice of his appearance," etc.

Again, section 532 of title 17, relating to proceedings in civil cases in justices' courts provides, that "either party may object to a pleading of his adversary, or any part thereof, that it is not sufficiently explicit to enable him to understand it, or that it contains no cause of action or defense, although it be taken as true. If the court deem the objection well founded, it shall order the pleading to be amended," etc.

These sections of the statute we deem conclusive of the whole subject, and that defective and insufficient pleadings can as well be reached in a justice's or probate court by demurrer as in a district court, and hence no judgment for want of an answer can be taken against a party in a probate court, who has demurred within ten days after service of summons upon him.

Judgment of the court below reversed, and cause remanded for trial.

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**PETER PENCE AND E. S. STERLING, PLAINTIFFS IN
ERROR, v. STEPHEN DURBIN, DEFENDANT IN ERROR.**

INJUNCTION—UNDERTAKING.—An undertaking for an injunction is sufficient without the signature of the plaintiff in the action.

CAUSES OF ACTION.—Those causes of action growing directly out of the breach of an undertaking can be the subject of but one action.

ANSWER—WAIVER.—An answer by a party, after the overruling of his demurrer, waives all defects in the complaint, except those which may properly be taken advantage of on a motion in arrest of judgment.

VERIFICATION—ANSWER—DENIALS.—When the complaint is verified, the answer must deny, specifically, every material allegation of the complaint, but need not traverse mere matters of surplusage.

DEFECTIVE VERIFICATION—MOTION TO STRIKE OUT.—An answer can not be disregarded because of a defective verification. A judgment rendered on the pleadings upon the grounds of such defect is erroneous. The only proper mode of reaching such a defect is by a motion to strike out.

VERIFICATION.—A verification of a pleading made by a person not a party to the action is sufficient if it shows any statutory reason why it is not made by a party to the action.

ERROR to the district court of the second judicial district, Ada county.

Albert Heed, for the plaintiffs in error.

Huston & Gray, for the defendants in error.

WHITSON, J., delivered the opinion. HOLLISTER, J., concurred. NOGGLE, C. J., dissented.

This action was brought in the district court of Ada county, by Stephen Durbin against Peter Pence and E. S. Sterling, to recover the damages alleged to have been sustained by reason of the issuing of an injunction in favor of one H. M. Freeman, against the said Durbin, upon the undertaking to which Pence and Sterling had become sureties. The defendants demurred to the complaint upon two grounds: 1. That several causes of action have been improperly united. 2. The said complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and leave given to the defendants to answer the complaint, they excepting to the decision of the court overruling the demurrer. Whereupon the plaintiff moved the court “for judgment on the pleadings, on the

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ground that the answer filed herein is irrelevant, inasmuch as it sets forth no defense whatever to the cause of action contained in plaintiffs' complaint. The motion was sustained and judgment given accordingly.

The defendants now bring their writ of error to this court, and assign as grounds therefor: 1. That the demurrer to the complaint should have been sustained. 2. That the motion for judgment on the pleadings should have been denied.

In support of the first point, it is urged that the bond, not being signed by the principal, Freeman, could not bind the defendants. Section 115 of the civil practice act provides that on granting an injunction, the court or judge shall require, except where the people of the territory are plaintiffs, a written undertaking on the part of the plaintiff, with sufficient sureties, etc. We think the undertaking in this case sufficient in this particular. The law does not require that the plaintiff shall execute an undertaking with sufficient sureties, but that an undertaking shall be executed on the part of the plaintiff, with sufficient sureties.

Again it is urged that several causes of action have been improperly united. This position we think untenable, as the causes of complaint all grow directly out of the breach of the undertaking, and can be the subject of one action only. Even if such objections were well founded, the defendant, having answered after the overruling of his demurrer, can not make such objection here. His right to take any advantage of the defects in the complaint is waived by answering. In such a case, all objections to a pleading are waived by answering, except such as may properly be raised upon a motion in arrest of judgment. (*Pierce v. Manturin*, 1 Cal. 470; *De Boom v. Priestly*, Id. 206.)

As to the second ground of error, we think it well taken. The motion for judgment was made upon the ground that the answer was irrelevant and was no defense to the cause of action set up in plaintiffs' complaint. The answer puts in issue every material allegation in the complaint. It is true, that the plaintiff gives the items of the damages sustained, which in the aggregate amount to two hundred and

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seventy-two dollars, but such items were unnecessary, as all such matters might have been given in evidence under the general allegation of damages on account of a breach of the undertaking; and therefore, such particularity being entirely surplusage, the defendant was not required to traverse them specifically. (*Racouillat v. Rene*, 32 Cal. 450.) But it is urged that the verification to the answer is defective, and that per consequence the answer was properly disregarded.

This position can not be sustained. The only way to reach such a defect is by motion to strike out the pleading for want of verification, so that the party may have an opportunity to amend in that respect, if he so desires. The verification is no part of the pleading, but is only a formality required to give it solemnity, and if a party does not make a specific objection to the pleading on that ground, he is presumed to waive it. This is especially so in this case, as the plaintiff in his motion made no objection on that account. (*Greenfield v. Steamer Gunnell*, 6 Cal. 67; *Drum v. Whiting*, 9 Id. 422; Nash's Pr. and Pl. 97.) But in this case we think the verification good. The affidavit is made by Freeman, against whom the injunction was issued, and who swears that the facts stated in the answer are within his personal knowledge, which is one of the cases in which the affidavit may be made by another person than the party.

Freeman does not state that the defendants are absent from the county, or that they are unable to verify the answer, but upon the other ground, provided in section 55 of the civil practice act, that all the facts are within his own personal knowledge. The reason he assigns for making the affidavit, is the very reason why the defendants do not make, or at least one of the reasons why they need not make it. In the reason assigned by him for making the affidavit, is embodied the very reason why the defendants do not make it.

The judgment of the court below is reversed, and cause remanded.

Opinion of the Court—Whitson, J.

JOHN GORMAN, APPELLANT, v. THE BOARD OF COMMISSIONERS OF BOISE COUNTY ET AL., RESPONDENTS.

COUNTY COMMISSIONERS—JURISDICTION.—A board of county commissioners is a tribunal created by statute, with limited jurisdiction, and only *quasi* judicial powers, and can not act except in strict accordance with the statute.

ASSESSOR—TAX COLLECTOR—OFFICIAL OATH.—An assessor and tax collector, whose oath of office as both assessor and tax collector is indorsed on his bond as assessor, is not required to take another oath as tax collector when he files his bond as tax collector.

OFFICIAL BOND, APPROVAL OF COMMISSIONERS.—It is the duty of the board of county commissioners to approve the bond of an assessor and tax collector *pro forma*, if, upon its face, it is *prima facie* good. The board may, at any time afterwards, cite the sureties, to make a further justification, and, in case it is deemed insufficient, may cite the officer to show cause why his office should not be declared vacant.

COUNTY COMMISSIONERS—RECORD—PRESUMPTIONS.—The order of a board of county commissioners, requiring the officers-elect to give bonds in particular sums, is of no force except as to the officers-elect at the time of making such order. The board of county commissioners is required, by law, to keep a record of its proceedings, and no presumption arises as to the regularity of any of their proceedings, not appearing of record, even though parties may have acted upon the supposed order of such board.

TAX COLLECTOR—OFFICIAL BOND.—A tax collector is not required, by statute, to give a bond with sureties in double the amount of the whole penal sum of his bond.

COUNTY COMMISSIONERS—JURISDICTION.—A board of county commissioners has no power or authority to pass upon the malfeasance or misfeasance of an officer; those questions belong to a higher tribunal, having jurisdiction to punish the officer, if found guilty.

INTENDMENTS—OFFICERS.—Every intendment of the law is to be taken in favor of those whom the people have elected to serve in an official capacity. Courts should not seek an excuse to defeat the will of the people, but rather to carry out and protect it.

APPEAL from the district court of the second judicial district, Boise county.

George Ainslie, Alanson Smith, and Milton Kelly, for the appellant.

H. E. Prickett and J. W. Huston, for the respondents.

WHITSON, J., delivered the opinion. HOLLISTER, J., concurred. NOGGLE, C. J., dissented.

John Gorman was elected at the general election in

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November, 1872, to the office of assessor and tax collector of Boise county for the term of two years, commencing on the first Monday in January, 1873, on which day he filed the necessary bond as such assessor, which was approved by the board of county commissioners. He also took the necessary oath as assessor and tax collector, which was duly indorsed on the bond. On the eighth day of April, 1873, Gorman presented an additional bond as tax collector to the board in the sum of fifteen thousand dollars, which was rejected by the board for reasons stated by them, but not necessary here to consider. On the eleventh day of April, 1873, he presented a second bond as tax collector, to the board, which was also rejected, for the reasons following, to wit:

“April 11, 1873, the bond of John Gorman as tax collector of Boise county is rejected for the reasons that it is not executed by sufficient and responsible sureties. James Hoey, one of the offered bondsmen, stated, after he had signed the bond, that he was drunk when he signed the bond, and that he would not be worth a dollar if his debts were paid.”

Further, “also Matt. Luney, who was on the bond offered on the eighth inst. for fifteen hundred dollars, whom we consider good for that amount at that time, is on the one offered this day for two thousand dollars; and in the mean time we have ascertained that he is on another bond for the sum of two thousand dollars, of which we had no knowledge on the eighth instant. He is also on the sheriff's bond as tax collector for the sum of one thousand two hundred and fifty dollars. This, with his other debts and liabilities, we consider more than his property is worth. Also Charles Kolny, one of the offered bondsmen, is liable on the bond of J. F. Cheatly, road supervisor of road district No. 2, for the sum of two thousand dollars, and on the bond of R. K. Errin, constable of Placerville, for the sum of one thousand dollars, and is assessed for only two thousand one hundred dollars.

“Also Hugh Craig's property consists principally of a

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ranch, which may be held as a homestead, and that his indebtedness is equal to the remainder of his property.

“Also on one of the commissioners saying that he would like to have some of the offered bondsmen appear before the board for further justification, Mr. Gorman replied that he would not bring any of them. For the foregoing reasons we are unwilling to accept the bond of John Gorman as tax collector for the years 1873 and 1874, who is now defaulter to Boise county in the sum of six thousand four hundred and fifty-seven dollars and twenty-four cents, or more. On the twelfth of April, 1873, the board made the following order, to wit:

“‘April 12, 1873. It is hereby ordered by the board of county commissioners of Boise county that the office of county assessor and *ex officio* tax collector held by John Gorman be, and the same is hereby declared vacant, for the following reasons, to wit:

“‘First, the said Gorman has failed to file a good and sufficient bond, as tax collector of said Boise county. Second, the said John Gorman is now a defaulter to Boise county, as county assessor and *ex officio* tax collector, in the sum of (\$6457.24) six thousand four hundred and fifty-seven dollars and twenty-four cents. Third, the said John Gorman has been willfully neglectful in the discharge of his duties as assessor and *ex officio* tax collector of Boise county. Fourth, that the said John Gorman has shown himself incompetent to properly discharge the duties of said office of assessor and *ex officio* tax collector of Boise county.

“‘It is hereby ordered by the board of county commissioners of Boise county that Ben. T. Davis be, and he is declared appointed assessor and *ex officio* tax collector of Boise county for the years 1873 and 1874, in place of John Gorman, removed from office.’ The bondsmen being satisfactory, the bond of Ben. T. Davis, as assessor and tax collector, was approved. It also appears from the record that the board, in October, 1868, fixed the bonds of the officers elect, and among them the tax collector’s bond at fifteen thousand dollars.”

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From the order rejecting his bond, as also the order declaring the office of assessor and tax collector vacant, and the order appointing Davis assessor and tax collector of Boise county in his place, Gorman appealed to the district court and the court affirmed the decision of the board.

The court, however, in passing upon the questions involved in the case, says: "If I should or could be confined to the subsequent action of the board of county commissioners, I should be compelled to say that while they have made a correct decision, they have offered no good reason for their ruling." The court then proceeds to give the reasons upon which to base the decisions affirming the action of the board, which are, substantially:

1. That the action of the board of commissioners of October, 1868, in fixing the amount of the tax collector's bond, was binding on Gorman.

2. That his oath of office was not indorsed on the bond.

3. That when the penal sum of any bond is fifteen thousand dollars, the sureties must be bound in double that sum, and each justify in the amount for which he becomes liable.

Gorman now appeals to this court. We do not think that the reasons given by either the commissioners or the district court can be sustained, or that the action of either, aside from the reasons given, can be affirmed, and in view of the various reasons given by each, we think that all the questions involved can be disposed of under six general heads, and under those we will consider the case.

1. A board of county commissioners is a tribunal created by statute with limited jurisdiction and only *quasi* judicial powers, and can not proceed except in strict accordance with the mode provided by statute. It has no right or authority to adopt any other mode than that required or provided by statute. The statute is its guide, and a strict adherence to it is as essential as that of the mariner to his compass. The whole tenor of the text-books and the authorities is to this effect. There is and can be no safety in any other rule. Men's rights can not be defeated by the mere discretion of such an inferior tribunal, and not even by one of much more extended jurisdiction. Leave, when once given, to go out-

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side of the statute and make rules and regulations to govern in such cases, would be very dangerous, not only to the letter but to the spirit of the law. The rule which will allow a board of commissioners to suspend a county officer without a "thus saith the law" would allow the district court to suspend the board, and this court to suspend the district court.

2. The board did approve Gorman's bond as assessor, and he took the oath both as assessor and tax collector, which was indorsed on this bond. The provision of the statute, therefore, which requires the tax collector to indorse his oath of office upon the bond required of him by the twenty-fourth section of the revenue act, can have no reference to any case except when the assessor has failed to take the oath as tax collector. When he took the oath as assessor, Gorman took the oath of office as assessor and tax collector at the same time, and the most that can be said of his action in that respect is that he took it before required to do so. Can it be claimed that by reason of such action he would not be liable for perjury in case he refused or failed to execute his duties according to the oath he had taken? Certainly not. It could not strengthen the bond, or bind any stronger the liabilities of the sureties, and is only a requirement for convenience, and therefore merely directory.

3. It was the duty of the board to approve the bond of Gorman *pro forma*, if upon its face it was *prima facie* good. There is no provision of statute pointing out any other course. Bonds are required to be in a certain amount and form, and the sureties are required to have certain qualifications which are to be determined by their several oaths. The seventh section of the law concerning the official bonds of officers in the case of a county officer, requires that the surety should justify that he "is a resident and freeholder or householder within such county, or an adjoining county, and that he is worth the amount for which he becomes surety over and above all his debts and liabilities in unincumbered property, situated within this territory, which may be levied upon and is not exempt from execution and forced sale."

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This is all that is required in the first instance. After having approved the bond the board might at any time afterwards require a further justification, under the provisions of the section just cited, if from any cause the board believed the sureties insufficient, and having once determined that the bond was insufficient might cite the officer to appear and show cause why the office should not be declared vacant. It appears that the county commissioners consulted the assessment roll for the purpose of impeaching the oath of those who had become sureties on this bond, and this too without giving the notice to either of the sureties to make a further justification. This mode of proceeding is not only in direct conflict with the seventh section of the act of the fourth session concerning the official bonds of officers, but very unjust to the sureties.

Besides all this the records show that the test provided by the statute, for determining the sufficiency of sureties, was not applied, and was entirely without the statute, even had the proper time arrived to test the sufficiency of the sureties, by way of further justification. The assessment roll of Boise county might not show all the property owned by the surety, and was therefore no good index to his worth.

4. The order of the board of 1868, requiring the tax collector elect to give bond in the sum of one thousand five hundred dollars, could not extend beyond the term of the tax collector then elect. The fact that assessors have been acting upon that order can make no difference.

The giving of the bond in any greater sum than that required by law or by the board, was entirely gratuitous on the part of Gorman. All the proceedings of the board are required to be made of record by the provisions of the sixth section of the act of the fifth session creating a board of county commissioners, etc., and hence it follows that anything not so of record, is no part of the proceedings. Nothing can be inferred or presumed as to the regularity of the proceedings of an inferior tribunal, with the limited jurisdiction which has been conferred upon the boards of county commissioners.

I consider that the object of the twenty-fourth section of

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the revenue act, was not only to fix the amount of the tax collector's bond, but also to make provision for requiring a bond in a greater amount whenever the exigencies of the case required it, and it is the duty of the commissioners to see that a bond in sufficient amount has been tendered by the tax collector; and it will not do for them to satisfy themselves that the matter is understood. It is their duty to make it understood by making it a matter of record as to what they want and require in the premises. A failure to do this is as much to be regarded as any little informality which officers may have neglected. It will not do to say that technicalities must be overlooked in a court, and yet the same court require the utmost particularity of those whose rights are being passed upon.

Again, Gorman did give a bond in the sum of fifteen thousand dollars, and the reason urged by the court below for rejecting the bond, to wit, that it did not conform to the requirements of the eighth section of the act of the fifth session concerning the official bonds of officers, can have no application to the assessor and tax collector, as the twenty-fourth section of the revenue act makes special provision in regard to the bond of assessor and tax collector.

5. The board of commissioners has no authority to pass upon the malfeasance, or misfeasance of any officer. The statute is plain and unequivocal upon that question, and it would be a novel proceeding if a board of county commissioners could declare an officer guilty of that for which the law imposes a heavy fine, and in some cases imprisonment, and having done so without hearing the officer or even giving him an opportunity to be heard, declare his office vacant, and then appoint his successor. Such a proceeding would soon render useless the criminal courts, and make the officers elected by the people "mere clay in the hands of the potter."

6. Every intendment of the law is to be construed most strongly in favor of those whom the suffrages of the people have elected to serve them. Courts should not seek for excuses to defeat the will of the people as expressed at the ballot-box, but should rather seek, if seek at all, for some

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excuse to protect that will inviolate. In this is our only safety. We have too much of that spirit which seeks to thwart the will of the people, and we have also seen some of the deplorable consequences.

Judgment of the court below reversed.

THE PEOPLE, RESPONDENTS, v. JAMES WATERS, APPELLANT.

RECORD IN A CRIMINAL CASE—EXCEPTIONS.—Any matter not otherwise forming a part of the record, must be made so, by a bill of exceptions.

IDEM.—All the formalities required by the statute to be observed in a criminal case, are not required to be made a part of the record.

PRESUMPTIONS.—This court can not presume that anything was omitted to be done, by the court below, that the law requires to be done, to insure a fair trial; but must presume, in the absence of any showing to the contrary by the defendant, that everything necessary to be done was done.

RECORD—MATTERS NOT A PART OF.—The statute does not require that the fact of the arraignment, or that the jury was admonished at each adjournment of the court, or that the officer in charge of the jury was sworn, should be made a part of the record of the action.

CRIMINAL LAW.—The formalities required by our statute to be observed, in the trial of felonies, are the same in one class or grade as in any other class or grade.

APPEAL from the district court of the third judicial district, Oneida county. The defendant was indicted for the crime of murder, and convicted of murder in the first degree. From the judgment of death, rendered upon that conviction, he appealed. After argument upon that appeal, at this term of the court, the judgment of the district court was affirmed; but no opinion was given in writing thereon. The following opinion was given upon a petition for a rehearing.

L. P. Higbee and V. S. Anderson, for the appellant.

F. E. Ensign and J. W. Huston, for the respondents.

WHITSON, J., delivered the opinion. HOLLISTER, J., concurred specially in the judgment. NOGGLE, C. J., dissented.

This cause comes before us upon a petition for a rehear-

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ing, this court or a majority of it having at the present term affirmed the judgment of the court below. The points to which our special attention has been directed as reasons why the petition should be granted are substantially:

1. That the record in the cause shows no formal arraignment of the defendant.

2. That the record does not show that the officer in charge of the jury, at each adjournment, or during their deliberations upon a verdict, was sworn as provided by sections 379 and 388 of the criminal practice act.

3. That the record does not show that at each adjournment of the court the jury was admonished as provided by section 380 of such act.

It is urged by defendant's counsel, that all these things being required by the law, must appear affirmatively by the record. We are fully aware that courts have held strictly to the doctrine of requiring everything to appear of record which the law enjoins in the trial of a person charged with a felony. Our statute, however, while it requires all the formalities known to the common law, has provided, by section 449, what shall constitute the record of the action. By section 479 it is provided what shall be sent to this court for our consideration on appeal, to wit: "A copy of the notice of appeal and of the record." Any matters not a part of the record must be taken advantage of by a bill of exceptions, which, when properly settled and signed by the judge, becomes a part of the record..

In the absence of any exception, as to those matters not required to be made a part of the record, no error can be presumed; and if such did exist, this court is powerless, in the absence of any effort on the part of defendant's counsel, to bring those matters properly here. It does not appear by the bill of exceptions that the court failed to do, or to have done, either of the things complained of in this petition.

It is true that the defendant is not bound to make a record, or to except to any error committed in his trial, which appears in the record proper of the cause, but if any substantial right has been denied him, or the court failed

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to do, or require to be done, any of the things essential to a fair trial, not required to be made of record, he must take advantage of it by exception, and force upon the record something which is not, by operation of law, a part of it.

In the case of the *People v. Corbett*, 28 Cal. 328, under a statute exactly like ours, the court says: "If the defendant had, at any time anterior to the trial, pleaded not guilty, the defects in the arraignment, or rather the omission to arraign, might have been cured on the ground of waiver." In that case there was no plea whatever, and the court held that there was nothing for the jury to try. In the case of *Jacobs v. The Commonwealth*, 5 Serg. & R. 317, the supreme court of Pennsylvania, while it did not sanction the practice, held that no record of the arraignment was necessary in cases of felony, except capital cases. Our statute makes no distinction in favor of one felony more than another as to the formalities to be observed, and if they can be dispensed with in one instance they may in any, so far as appearing upon the record is concerned. We think, however, with the supreme court of Pennsylvania, that these omissions in the practice ought not to be sanctioned.

Section 243, of the criminal practice act, provides that "No indictment shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon, be affected by reason of any defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant." Again section 486, of the same act, provides, that "after hearing the appeal, the court shall give judgment without regard to technical error or defect, which do not affect the substantial rights of the parties."

But it is urged that these are substantial rights. Be it so; but it is not a substantial right to have these things appear in the record, and it does not appear that the defendant has been deprived of them, and as before stated, that not required to be made of record must be taken advantage of, affirmatively, by the defendant. Does, then, the record, required by law, show a proper and legal conviction of the defendant, or does it show error? We think it shows no

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error, and further that the defendant has failed to show error *de hors* the record.

Having dissented from the opinion of a majority of this court affirming the judgment of the court below, it might not be improper to give my reasons here for not granting this petition. A majority of this court do not differ upon the illegality of the act of the legislature, providing for seven grand jurors, instead of what they are pleased to term, "a common law grand jury," while on the other hand, I hold that it is a rightful subject of legislation, and entirely within the control of the law-making power of the territory. Therefore any new trial by the court below could not rectify that error, if error it be.

It has repeatedly been held that the states may even abolish grand juries entirely, and that article 5 of the amendments to the constitution of the United States has no reference to any crimes, except those of which the federal courts have cognizance.

Any other construction would deprive the states of legislating upon the subject to the extent of abolishing grand juries, or of reducing the number below twelve. There is not even an inference to be deduced from any law of congress, admitting any of the states into the union, or in fact any other law, that the states may not legislate upon this subject, and if it be the right of a person to be indicted or presented, by a grand jury, before he shall be held to answer for a capital, or otherwise infamous crime, by what process of reasoning can the conclusion be reached, that by becoming a resident of a state a person has surrendered his rights under the constitution to be indicted or presented by a grand jury, before he can be tried? But the legislature of this territory has not even attempted to deprive a person of the right to be indicted or presented by a grand jury, but only reduced the number to seven instead of twelve or more. Can it with reason be urged that not less than twelve can constitute a grand jury? If such were the construction, even congress could not reduce the number without amending the constitution of the United States. Congress, by the provisions of our organic act, has confided

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to us the manner and form of disposing of all those questions arising as to the rights of person and property of our people, not inconsistent with the constitution of the United States, and the provisions of that act, with certain exceptions, and this act of the legislature, not being inconsistent with either, it seems to me that it is a proper subject of legislation.

For the reason above stated the petition for a rehearing is denied.

HOLLISTER, J. I dissent from the views entertained by Justice Whitson respecting the validity of the law of the legislature, passed at its seventh session, prescribing the number of grand jurors, and fully concur with him upon all the other points, raised upon the petition for rehearing, which are stated in his opinion.

M. B. WILKERSON ET AL., PLAINTIFFS, v. L. R.
WALTERS ET AL., DEFENDANTS.

EQUITY—MULTIPLICITY OF SUITS.—The doctrine of the interposition of a court of equity to prevent a multiplicity of suits can not be maintained where there is simply a multitude of individuals, plaintiffs, whose several interests are not dependent upon one another.

EQUITY—REMEDY AT LAW.—Equity will not relieve where the parties have had a plain and speedy remedy at law, which, by their own negligence, they have not availed themselves of.

ACTION to enjoin the collection of judgments for taxes. Certified by the district court of the second judicial district, Ada county.

Huston & Gray, for the plaintiffs.

Prickett & Hasbrouck, and *F. E. Ensign*, for the defendants.

WHITSON, J., delivered the opinion. HOLLISTER, J., concurred. NOGGLE, C. J., dissented.

This case is presented to us upon a petition for a rehearing, and no opinion having been written at the time of, nor since the decision of the case, we propose to give our views

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upon the whole case upon this application: 1. As to avoiding a multiplicity of suits. 2. As to the remedy at law.

The doctrine of the interposition of a court of equity to prevent a multiplicity of suits can not be maintained where there is simply a multitude of individuals whose several interests are not depending upon one another. It can make no difference to Wilkerson in this case, whether the other plaintiffs are obliged to pay this tax or not, and *vice versa*. There is no community of interest between them, and the question presents itself only as to whether there is any danger of a multiplicity of suits as against each of these plaintiffs. Clearly, there is none, as the act of the legislature of 1872 and 1873 places them without doubt in this county, and the cause which led to the conflict between the counties in making the assessments is not likely to again occur.

Again, the parties having once had an opportunity to contest the collection of these taxes in a court of law, and having failed to do so, are in no condition to ask the interposition of a court of equity when the remedy at law was ample and complete. The plaintiffs might have defended against the collection of these taxes under the thirty-ninth section of the revenue act, and might even now have the judgment against them reopened and set up the defense provided by the fourth subdivision of that section, or if the taxes are void they might sue each and every of the officers who should attempt to levy upon their property to satisfy the amount of the taxes.

It may be, and no doubt is true, that courts of equity will often lend their powers to test the validity of a law of the legislature; but in such cases the party coming into a court of equity, must not have been guilty of laches in defending against the thing sought to be enforced, when an opportunity has been presented to do so in the ordinary course of the law. The parties in this case have had ample opportunity to resist the payment of these taxes in the actions which were instituted against them, and failed to make any defense. While courts of equity will often interfere to prevent the collection of a void tax, they will only do so where the parties have had no remedy in the due course of law.

Points decided.

The old maxim, that "those who ask equity must do equity," is very applicable in this case. It does not appear but that the court which rendered the judgments in these cases had complete jurisdiction of the persons of the plaintiffs, and if so, they were certainly guilty of laches in not making the defense that they were residents of Idaho county, and that their property was all within such county. This they could easily have done, if such was the fact, and thus have avoided the necessity of appealing to a court of equity. It is true that courts of equity will often interfere to prevent the enforcement of a void judgment, but in such cases the judgment sought to be avoided must appear to be void upon the face of the record, and not for some reason *de hors* the record, which might have been urged against its rendition in the court where it was rendered, and which the party, by his own negligence, failed to do.

We do not conceive it necessary to pass upon any of the other questions raised, as we deem the reasons already given the only pertinent ones in the case, the question of the validity of the act of the legislature of January 10, 1873, validating the judgments against these plaintiffs, being likely to arise in future proceedings thereunder.

Petition denied.

**MARGARET RAY, RESPONDENT, v. HENRY T. RAY AND
FERDINAND DANGEL, APPELLANTS.**

EQUITY—ACTIONS.—An action will not lie in a court of equity, to enforce a decree against a person not a party to such decree; nor will such action lie against one who is a party to such decree when he remains within the jurisdiction, and is amenable to the process of the court which rendered the decree.

COURTS OF EQUITY.—There is no power in a court of equity to confirm or enforce a void judgment by a subsequent proceeding instituted for the purpose.

HUSBAND AND WIFE—COMMON PROPERTY.—The husband has the absolute power to dispose of the common property of himself and wife, to the same extent, and in the same manner as he has of his separate property, until a legal separation has been effected by a court of competent jurisdiction, and a division made under the direction of such court.

INJUNCTION.—An injunction will not lie to prohibit a person from bringing an action to test his right to property, even though such right has been adjudged against him in an action to which he was not a party.

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APPEAL from the district court of the second judicial district, Ada county.

J. Brumback and F. E. Ensign, for the appellants.

V. S. Anderson, for the respondent.

HOLLISTER, J.; delivered the opinion. WHITSON, J., concurred. NOGGLE, C. J., dissented.

This case is brought to this court on an appeal from a decree of the district court of Ada county, rendered against the appellants in favor of the respondent. The circumstances of the case, as disclosed by the record, are as follows: The respondent filed her bill for a divorce against the respondent Henry T. Ray, in said district court, on the fifth day of February, 1873, and for the custody of the children, and the division of the common property. On the third day of May following, a decree was rendered, dissolving the bonds of matrimony, and adjudging that the respondent have the care and custody of the children, and that all the property (excepting a certain claim) owned and held by the parties on the thirty-first day of January, or the first day of February, 1873, the day of the separation, be divided between them. On the thirty-first day of January, 1873, the day of the separation, the parties owned and held among other things, the following property, viz., two hundred and eighty-eight head of cattle, which with the natural increase, the respondent claimed, was to be divided between herself and her husband.

The bill which is the foundation of this action, alleges that the defendant, Ray, conspiring and confederating with defendant, Dangel, did on the fifth of February, 1873, the day the action for a divorce was commenced, make a pretended sale of two hundred and fifty-one head of said cattle, with the intent and purpose of defeating any judgment that might be rendered in said action for divorce, and hiding and covering up the property of said defendant, Ray, so that no decree for the division of the same can be enforced. That Dangel was fully aware at the time that a separation had taken place, and that a suit for a divorce had been, or

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was about to be commenced, and of plaintiff's right to, and interest in, and part ownership of the property, and that all of said facts had been presented to said court in said action for divorce, and the intent to defraud plaintiff by said pretended sale, fully and plainly appearing, the said court in its decision and judgment, and decree, set aside the pretended sale as fraudulent, and decreed a division of all the property fraudulently claimed by Dangel, being the identical property owned and possessed by plaintiff and defendant Ray on the thirty-first day of January, 1873, and that by said court the title to said property was fully and completely adjudicated and determined, and can not be changed except by a reversal or modification of said decree.

The bill further alleges that a stay of proceedings was allowed in said action, that is, until the sixth day of May, and on the application made by the plaintiff, a temporary restraining order was granted, restraining the defendants, Ray and Dangel, from disposing of, and removing the said property, and they were further ordered to show cause why said restraining order should not be made absolute, and a receiver appointed to take possession thereof. That due service of the restraining orders was made on Ray and Dangel, who both appeared and answered, but failing to show sufficient cause, the order was made absolute, and a receiver was appointed on the thirteenth day of May, and defendants were ordered to deliver possession of the property to the receiver, who was authorized to divide it between the plaintiff and defendant Ray, on the expiration of the stay of proceedings. That through threats and misrepresentations of defendants, no person could be got to take the position of receiver, and give bonds as required, Dangel threatening to sue and resist the receiver.

That on the twenty-fourth of May, the time of the stay of proceedings having expired, on application of plaintiff, and in pursuance of said decree, and to enforce the same, it was ordered by the judge of said court that the clerk issue final process to the sheriff to enforce the decree as to the division of the property, directing the sheriff to seize and take the same, in whosoever hands or possession it

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might be found, and to collect and divide the same into two equal parts, delivering one moiety or part to plaintiff, and one moiety or part to defendant, Ray; and to make all the costs of said action and all accruing costs out of the moiety or part of said defendant Ray. That said final process was placed in the hands of the sheriff, who is now engaged in executing the process, and has taken possession of all the property that could be found, and within a day or two be prepared to divide the same as directed. That the said Dangel was in said final process and order restrained from interfering or hindering the sheriff in executing said process, or interfering with said property.

That said order was duly served on said Dangel; but, disregarding the order of the judge, he did, on the twenty-eighth of May, demand, in writing, the redelivery of all said two hundred and fifty-one head of cattle to him by the sheriff, claiming the same by virtue of the said pretended and fraudulent sale of February 5, 1873, which had been set aside and annulled by the court; and that the said sheriff, refusing to redeliver the same, and continuing to obey the order of the judge in the premises, the said Dangel applied to the judge of said court for permission to bring suit against said sheriff for the possession of said two hundred and fifty-one head of cattle; and the title to the same having already been determined, the said Dangel was not permitted to bring such suit, nor interfere with the enforcement of the decree in said action.

That Dangel, disregarding and disobeying the restraining order before that time issued, did, on or about the twenty-fourth of May, proceed to brand the calves—the natural increase of said cattle—or the greater part of them, with the letters “F. D.,” and has changed and altered the appearance of the same, with the intent to deprive and defraud the respondent of her interest therein, and would have branded all of them, unless prevented by the sheriff.

That ever since the thirty-first day of January, the day of the separation, the defendants have conspired and combined together, and planned to defeat and deprive plaintiff of her interest in said property, and that since the said decree,

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they continue, and are continuing to conspire, plot, and plan, for the purpose of defeating said decree and depriving plaintiff of her interest in said property, and that they have done much, and are continuing in their acts to interfere with the process of the court, and to thwart plaintiff of her just rights under said decree. That defendants found all their acts and claims upon the said pretended and fraudulent sale of February 5, which has been disposed of by the court. That they threaten to destroy the property before plaintiff shall have any benefit therefrom. That they threaten to kill and murder any person plaintiff puts in charge of the cattle, and to take forcible possession of the same from plaintiff, or her agents, after they are placed in her possession by the sheriff.

That if they can not obtain possession of them by force, the said Dangel, instigated by Ray, intends to bring suit against plaintiff, and replevy the same from her; claiming the same under said fraudulent sale of February 5, which has already been set aside; the purpose being to prevent plaintiff from having and enjoying the property decreed by the court to belong to her, and to worry her, and compel her to accept a compensation, and to take the sum only of eight hundred dollars for all her interest in said property. That they brag and threaten, unless she takes the said sum of eight hundred dollars she shall never receive any benefit whatever from said property. She alleges she is wholly without means or property whatsoever, except her interest in said property (and other property, describing it), and if said Dangel be permitted or allowed to commence and prosecute actions against her for the possession of one half of said two hundred and fifty head of cattle and to retain possession of the other half now about to be divided in accordance with the decree of the court, she will receive great and irreparable injury and damage, and the decree and judgment of the court entered in said action will be rendered null and ineffectual as to the division of the property, and the said Ray and Dangel will have succeeded in accomplishing their designs and intentions in defrauding her of all her interest in

said property, and rendering nugatory the decree and judgment of the court.

That she desires the said judgment and decree to be forthwith carried into execution, and is advised the same can not be done without the assistance of this court, there being no remedy at law in the premises, and inasmuch as the title to and interest of all concerned in and to said property, has been determined and adjudicated in said action, and the said Dangel has and can have no interest therein by virtue of said pretended sale, so long as the said decree stands.

To the end, therefore, that justice and equity may be done, and that the conspiring and confederating of the defendants may cease, and they be prevented from further interfering with or hindering the enforcement of the said decree, and that the same may be forthwith carried specifically into execution, and the defendants ordered to do and concur in all necessary acts for the purpose, and that what has already been done may be confirmed.

Plaintiff prays that defendants, or either of them, be restrained from commencing any suit or action of any kind against her for the recovery of the possession of any of said property after the same shall be delivered to plaintiff by the sheriff, or from branding or marking any of said cattle and calves, and from interfering or meddling with said property, or any of it, and from trying to prevent the sheriff from fully executing the final process, and from making the costs and accruing costs out of the moiety or part that may be allotted to the defendant Ray, or from doing anything to prevent the complete carrying into execution the order in said action, and for such other and further relief, etc.

To the bill the defendants put in their separate general demurrer, "that the plaintiff had not by her bill made or stated such a case as entitles her in a court of equity to any relief against either of them." The court overruled the demurrers, and on a hearing of the case adjudged:

1. That all sales, transfers, deeds, bills of sale, or agreements, in regard to the property made since the thirty-first

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day of January, 1873, the day of the separation between the plaintiff and defendant Ray, by defendant Ray to defendant Dangel, be and the same are set aside, and held to be null and void and of no effect whatever.

2. That the plaintiff on the thirty-first day of January, 1873, owned and was entitled to one half of the property. That on that day the same was owned by plaintiff and defendant Ray in common, and held by plaintiff and defendant Ray, and that any sale made since that day of plaintiff's half of said property by defendant Ray to defendant Dangel, can not affect such title.

3. That all of said property be equally divided between plaintiff and defendant Ray, by the sheriff delivering one moiety to plaintiff and one moiety to defendant Ray.

4. That the division heretofore made by the sheriff under the process of this court, issued in the cause of Margaret Ray and Henry T. Ray by the direction of the judge of this court, be and the same is hereby confirmed and considered valid and effective. And the title to the moiety so delivered to the plaintiff under said process on the day of June, 1873, is confirmed, and the same is fully and completely vested in the plaintiff.

5. That the said Dangel be and he is restrained from interfering with the sheriff in dividing the property, and from suing him for what he has done in executing the process of this court in said action of *Ray v. Ray*, in seizing said property and dividing it as ordered, and in levying upon the part allotted to said Ray and selling the same to pay the costs in said action, and the costs in making said division."

The district court, after several findings of fact in the case, deduced the following propositions of law, viz.:

1. That the plaintiff, from the moment of her separation on the thirty-first day of January last, became the individual and separate owner of an undivided one half of all the said common property, and that the defendant Ray had no right to sell thereafter any of said property without the consent of the plaintiff.

2. That any sale of any of the said property on the thirty-first day of January last by defendant Ray to defendant

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Dangel, who had notice and knowledge of the separation and the intended divorce, was in violation of the law and the rights of the plaintiff, and is therefore void and of no effect.

3. That the plaintiff is the owner of the property delivered to her by the sheriff of Ada county, in the division made under the direction of the court in carrying out said decree in the case of *Ray v. Ray*, and that neither one of said defendants has any right, title, or interest in or to said property, or any part thereof, delivered by the said sheriff to plaintiff in executing the final process in said cause.

4. That the sheriff, in executing the process of this court, had the right to seize and divide said property and its natural increase, and that he did not exceed his authority, and is not liable to either of defendants.

5. That plaintiff is entitled to a decree, setting aside all sales made by defendant Ray to defendant Dangel, and confirming what has been done in said action of *Ray v. Ray*, and confirming the title of plaintiff to the property delivered to her by the sheriff in making the division, and restraining said defendant, Dangel, against suing the sheriff for executing said process, and making said division, and from interfering in the further division of said property and its natural increase; and that said plaintiff is also entitled to a decree dividing the said real estate, and all other property undivided.

6. That the plaintiff is entitled to a judgment for costs against said defendants.

To these findings of law, the defendants duly excepted, and entered their motion for a new trial, which motion was overruled, and exceptions duly taken thereto.

It is an admitted principle, that a court of equity will not take cognizance of a case which has been already determined by a court having jurisdiction of the subject-matter and of the parties, and where the parties to such suit are amenable to any process which may be ordered out to carry such judicial determination into execution. This general principle has its exceptions, but the case at bar does not come within any of them.

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The appellant, Ray, was a party defendant in the suit brought by respondent for a divorce and a division of the common property. A decree was rendered by the court in that suit for a divorce, and also for a division of the common property, embracing the property in question; and final process was issued under the direction of the court, to carry the decree into execution. This judgment was final and conclusive upon the appellant, Ray, and embraced every material thing that is set up by the respondent in her bill in this suit as grounds for equitable relief. If the appellant, Ray, alone, or by collusion with Dangel, or any other person, had sought, by any act or threat of his, to hinder, delay, or defeat the execution of the final process in that suit, as alleged in the bill, or attempted to deprive respondent of any right or interest in and to the property to which she was entitled by the decree, he could have been dealt with summarily, by proceedings for contempt; and such summary dealings would have been as effectual to secure and protect the rights of the respondent, as any judgment or decree that could be rendered against him in her favor in this action.

It will be observed that the bill does not show that Ray was beyond the jurisdiction of the court, nor the reach of its process, and hence there was no necessity for bringing a new action against him to enforce the decree. This proceeding, therefore, for enforcing the decree in that case as to him, was entirely unnecessary, and the district court should not have entertained jurisdiction of it, but should have sustained his demurrer and dismissed the bill. This principle of law is clearly deducible from the opinion of the supreme court of the United States, in the case of *Barber v. Barber*, 21 How. 582, in which the court says: "That when a court of competent jurisdiction over the subject-matter and the parties decrees a divorce and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, courts of equity will interfere to prevent the decree from being defeated by fraud. The interference, however, is limited to cases in which alimony has been decreed, then only to the extent of what

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is due, and always to cases in which no appeal is pending from the decree for the divorce and alimony."

In that case a decree for divorce *a mensa et thoro*, and for alimony, had been rendered by a court of competent jurisdiction in the state of New York, and after the decree was rendered against the husband, he removed to the state of Wisconsin, leaving the alimony unpaid. To enforce the collection of the alimony, it became necessary to bring suit in the state of Wisconsin for its recovery, and this because the summary process of the court in which the alimony was awarded could not reach the husband. If it could be admitted that the decree in the case of *Ray v. Ray*, as to respondent's right to a portion of the property alleged to have been purchased by Dangel on the thirty-first of January from Ray, concluded him, the same principle of law would apply with equal force, and no suit against him would, therefore, have been necessary to enforce it, and it would be equally applicable, if Dangel, without any claim of right to the property in controversy, and standing equally indifferent between the parties so far as his own interests were concerned, had conspired with Ray, or with others, to defeat the execution of the decree, and thereby attempted to defraud the respondent of her rights established by it; for it is not to be doubted that he would have been equally guilty of a contempt of the lawful authority of the court, and as much amenable for such contempt as Ray himself. This not being the case, however, we must proceed to dispose of the question as to him, upon different principles, and for different reasons.

The bill in this case, as its title imports, was filed "to carry a decree into execution," and not for the purposes of setting aside the sale of the property by Ray to Dangel on the ground of fraud upon the rights of the respondent. Its theory is, that by the decree in the divorce suit the sale of the property was declared to be null and void, and that Dangel took nothing by his purchase; that on the separation of respondent from her husband on the thirty-first of January, her share of the common property became absolutely vested in her; and that any sale thereafter by the hus-

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band was a nullity, and conveyed no title to Dangel; and that any attempt by him to recover or retain the possession of it after the decree, was illegal, and should be restrained by the court, and that this could only be done by instituting another suit on the equity side of the court, making him a party defendant therein.

This theory the district court accepted as the true one, and decreed accordingly. It has been shown, that if the former decree setting aside the sale was binding on Dangel, and that his right to the property in question had been determined by it, no proceeding by a new or original action would have been necessary, for the reason that he could be dealt with in a more summary manner if he had attempted to hinder, delay, or defeat the execution thereof, or to deprive respondent of any rights which had been secured by it. But he was not a party to the proceedings in the divorce suit, nor to the action which determined that he took no title by his purchase from Ray, and as a consequence, he had the undoubted right to assert his claims to it, by refusing to surrender it to the respondent, or the receiver appointed by the court to take possession and make division of it, or by instituting such legal proceedings as were necessary to establish his title thereto.

So far as the decree seeks to set aside the sale on the ground that it was a fraud upon the equities of the respondent, it was a nullity as to Dangel, and no order of the court restraining or prohibiting him from taking any steps to establish his claim to the property was of any validity. This is a principle of law which addresses itself to the commonest understanding, and so well established by authority as to need no extended comment. (*Hahn v. Kelly*, 34 Cal. 402.)

If the law were held to be otherwise, and the former decree were to be considered as to Dangel's rights, as *res judicata*, it would in effect deprive him of his property without due process of law, and be a violation of the constitution of the United States. It is an axiom, that no man shall be deprived of his property without the institution of a suit against him conducted according to the prescribed forms

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and solemnities for ascertaining the title thereto. (2 Cooley on the Const., secs. 1945–1951.) It seems in this case, that the bill was framed for the purpose not only of carrying into execution the former decree, but also of making so much of it as adjudged Dangel's title to the property a nullity in a proceeding to which he was not a party, valid and binding upon him; in other words, it sought, by making him a party to this proceeding, to give validity to that which by the former decree was of no validity so far as it affected Dangel's rights.

It may be admitted for the purposes of the argument that if the respondent had brought her action against Dangel with the object of setting aside the sale to him on the ground of fraud, and with a view to the assertion of her right to one half of the cattle on a division of the property between herself and Ray under the direction of the court, and not for the purpose of establishing or confirming the former decree, it could have been maintained. In such a proceeding the *bona fides* of the transaction could have been attacked and the sale set aside if found to be in fraud of her rights and her title to one half of the property established. This, however, she has not seen fit to do; but, relying upon the adjudication in the divorce suit, which held that the sale was a fraudulent one, she now seeks to bind Dangel by a confirmatory judgment, without any further inquiry as to the character of the transaction between the appellants Ray and Dangel.

It is true, the record shows that full inquiry was made and proofs received as to the *bona fides* of the sale and a judgment had thereon, but the bill in its scope and aim laid no foundation for any such inquiry nor for any adjudication of that character, and hence the judgment, not being supported by the case made by the bill, was erroneous.

The case might be disposed of without further inquiry on the above grounds, but, as the question of the right of the husband to dispose of the community property before a legal separation between him and his wife took place may arise hereafter, it is deemed important to consider and settle it here.

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By the common law it is said that by marriage, the husband and wife become one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband, under whose wing and protection she performs everything. Upon this principle of union in husband and wife depend almost all the rights, duties, and disabilities that either of them acquire by the marriage. For this reason, a man can not grant anything to his wife, nor enter into a covenant with her; for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself; and therefore it is generally true, that all compacts made between husband and wife when single, are avoided by the intermarriage. (Co. Lit. 112; 1 Bl. Com. 442.) "The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost and suspended during the existence of the matrimonial union." 2 Kent's Com. 128.

Thus it will be seen that by the common law, the husband had the complete control of all the property owned and possessed by either the husband and wife during coverture, whether acquired before or after the marriage, and could dispose of it at his pleasure, without the consent or even against the wishes of the wife, and no fraud could be imputable to him for so doing.

It would be useless to trace the different stages by which the rights, duties, and privileges of married women have been enlarged under the spirit of a more enlightened age, by statutory enactments, and we will therefore content ourselves with a reference to so much of our statute as can be supposed to have any bearing upon the case before us.

By the provisions of section 2, chapter 9, of the laws of the fourth session, all property acquired after the marriage by either husband or wife, except such property as may be acquired by gift, bequest, devise, or descent, shall be common property. By section 9, "the husband shall have the entire management and control of the common property,

with like absolute power of disposition as of his own separate estate, and the rents and profits of the separate estate of either husband or wife shall be deemed common property, unless in the case of the separate property of the wife, it shall be provided by the terms of the instrument whereby such property may have been bequeathed, devised, or given to her, that the rents and profits thereof shall be applied to her sole and separate use, in which case the entire management and disposal of the rents and profits of such property shall belong to the wife, and shall not be liable for the debts of the husband."

It will be unnecessary to inquire whether this absolute power of disposition by the husband, of the common property, which the law gives him, goes to the extent that he may dispose of it in fraud of his wife's rights or interests; or, in other words, whether, as at common law, she has no rights or interests of which she can be defrauded by any such disposition, because the question does not arise in this case.

The point presented for our consideration is simply this: Was the sale of the property by Ray to Dangel, after the thirty-first day of January, the day of the voluntary separation by his wife, and before the legal separation was effected in the divorce suit, a valid sale, or was it a fraud *per se* upon the wife, who had or was about to institute a suit for a divorce and a division of the common property? The answer to this must be, that the sale was a valid one, so far as it is necessary to consider it in this case.

The law gave him the absolute right of disposal, as much so as if it had been his own separate estate. (*Van Merun v. Johnson*, 15 Cal. 311.) The mere act of voluntary separation by the wife, even with the expressed intention of bringing her suit for a division of the property, did not of itself change the character of the community property, and rest it in herself in her individual right. Her husband retained the same absolute control and power of disposition over it, under such circumstances, as he possessed before the separation, and any sale made by him to another in good faith, and for an adequate consideration, was as valid in

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law, as though no separation had taken place. (*Lord v. Hough*, 43 Cal. 585.) The sale, under such circumstances, was as much for her benefit as for her husband's. The consideration received became a substitute for the property sold, as common property, and inured equally to the benefit of the husband and wife.

But the decree went to the extent that the sale was a nullity because the character of the property was changed, by the voluntary separation of the wife from her husband, on the thirty-first day of January, and by such separation it thereafter becomes her separate property, over which her husband had no longer any control, and by the sale of which he conveyed no title to Dangel. Neither the original bill nor the decree attacks the *bona fides* of the sale and purchase on ground of inadequacy or want of consideration, and even if it was so considered by the court, the sale could not be set aside on the ground of fraud on the part of Dangel, because he was not made a party to the action.

There is another point to be considered, viz.: The decree in the divorce suit adjudging the property in controversy to have been fraudulently purchased by Dangel, and as a consequence, that he took no title to it under the sale by Ray, being a nullity as to him. Can this proceeding, which seeks to confirm that decree and to carry it into execution, be upheld? A moment's consideration will suggest the answer.

Even the legislature has no power to make a law valid by a subsequent enactment, which it had no authority in the first instance to pass. Lacking the authority to pass the law, which it seeks to validate, it is wanting in power to vitalize and give effect to the void enactment. The same principle holds good in relation to the authority of courts. If it were otherwise, the rights of person and property would be without the protection of the law; a judgment might be rendered which would invade a man's most sacred rights, without giving him a hearing, and all that it would be necessary to do to render it valid would be to bring another action to confirm and make it good. This would be transcending the limits prescribed to legislative authority, and would, in effect, place the judicial above the legislative

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department in its power to render valid that which it had no authority to do in the first instance.

The principles of law deducible from this case are briefly as follows:

1. An action will not lie in a court of equity to enforce a decree against a person not a party to such decree.

2. Nor will such action lie against one who was a party to such decree, where he remains within the jurisdiction, and is amenable to the process of the court which rendered the decree.

3. There is no power in a court of equity to confirm or enforce a void judgment by a subsequent proceeding instituted for the purpose.

4. A husband has the absolute power to dispose of the common property of himself and wife, to the extent, and in the same manner, as he has of his separate property, until a legal separation has been effected by a court of competent jurisdiction, and a division made under the direction of such court.

5. A person can not be prohibited from bringing an action to test his right to property, by a restraining order of a court in which such right has been adjudged against him in an action to which he was not a party.

The court having erred in overruling the general demurrer of appellants, the judgment must be reversed and the bill dismissed at the costs of respondent, and the appellant Dangel be permitted to proceed for the recovery of the property in controversy.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT,
JANUARY TERM, 1875.

PRESENT;
HON. W. C. WHITSON, } JUSTICES.
HON. M. E. HOLLISTER, }

C. W. MOORE, RESPONDENT, *v.* J. B. TAYLOR, APPELLANT.

STATEMENT ON APPEAL.—AUTHENTICATION.—An agreement by the respective parties to an action that a certain document is the statement in the case, is, substantially, an agreement that such statement is correct.

IDEM.—An intelligible and definite reference, in a statement, to papers and exhibits, by letters or numbers, as attached to and constituting a part of the statement, is sufficient, without any incorporation of the same at length into the statement.

IDEM.—Where affidavits, depositions, or minutes of the court are incorporated into a statement, either in *hæc verba* or by appropriate reference, it is unnecessary to have any further identification of them.

APPEAL from the district court of the second judicial district, Ada county.

H. E. Prickett and J. Brumback, for the motion.

Alanson Smith, contra.

Opinion of the Court—Whitson, J.

WHITSON, J., delivered the opinion. HOLLISTER, J., concurred.

This is a motion to strike out the statement, and certain other papers in the transcript, on the grounds, substantially, as follows: 1. The statement has not been sufficiently authenticated by a certificate of the parties. 2. That certain papers and exhibits, purporting to be a part of the statement, have not been incorporated into it. 3. That certain papers and exhibits have not been identified, as having been read and referred to on the hearing of the motion, by either the judge or clerk.

We think that it is sufficient authentication of a statement, if the parties certify that it is the statement in the case. It would be allowing a party to act in bad faith, after having agreed that a certain document was the statement in the case, to then take advantage of such agreement on the ground that the certificate did not state that the statement was correct. By the terms of this certificate, if the statement is not correct the parties have certified falsely, for they certify that it is the statement in the case; and if not correct, it is not a true statement.

Again, it is urged that the statement is a "skeleton statement," because exhibits and papers are referred to which are not contained in it. There are many exhibits and papers referred to so indefinitely and unintelligibly, that they can not be considered as a part of the statement. In such cases they simply form no part of the statement, and must be treated as though no reference whatever had been made to them. In all cases, however, where a paper or exhibit which is found in the transcript is referred to by letter or number, and by express language of the statement is made a part of it, no incorporation of it in *hæc verba* is necessary. (*People v. Bartlett*, 40 Cal. 142; *Kirstein v. Madden*, 38 Id. 158; *Leszinsbry v. White*, 45 Id. 278.)

Lastly it is urged that certain affidavits had not been identified by an indorsement of the judge or clerk as having been read or referred to on the hearing. The provision of the statute requiring such identification was evidently in-

Points decided.

tended to cover those cases where no statement is made, and where it is sought to use the affidavits which were used on the hearing of the case in the court below, in the appellate court. But where affidavits, depositions, or minutes of the court are incorporated into a statement, either in *hæc verba* or by appropriate reference, it is unnecessary to have any further identification of them.

Hence it follows that the motion must be sustained in part and refused in part, and in order that the parties hereto may have no difficulty in applying this opinion to the very complicated record in this case, we herewith append a schedule of the papers, exhibits, orders, judgments, etc., which we will consider in the transcript filed herein, which said schedule is a part of this opinion marked "A."

**JAMES H. ALVORD ET AL., PLAINTIFFS IN ERROR, v.
THE UNITED STATES, DEFENDANT IN ERROR.**

CONTINUANCE.—A party is not entitled to a continuance of a cause without showing due diligence and the use of legal means to procure the desired evidence. A bare request to furnish the evidence is, in no sense, a compliance with the requirements of the law.

DUE DILIGENCE.—Where a witness is beyond the reach of the process of the court, a party desiring his testimony must sue out a commission to take his deposition, and a failure to do so shows a want of due diligence and a neglect to use the proper means to obtain the evidence.

PRODUCTION OF DOCUMENTS—NOTICE—PRACTICE.—When documentary evidence which a party needs in the trial of a cause, is in the hands or under the control of the opposite party, before the latter can be required to produce it on the trial, he must have due notice thereof. When he has it in his possession, in court at the trial, notice at the time is sufficient; otherwise, to be effectual, it must be served upon him a sufficient length of time before the trial to enable him to produce it.

JUDGMENT ON THE PLEADINGS.—If the allegations of a complaint are not denied by the defendant, the plaintiff is entitled to a judgment on the pleadings, without any proof on his part.

OFFICIAL BOND—CONVERSION.—In an action upon an official bond for a breach of duty, an allegation that the defendant unlawfully converted money to his own use, does not change the action into one of tort.

ERROR to the district court of the first judicial district, Nez Perce county.

Opinion of the Court—Hollister, J.

Smith & Kelly, for the plaintiffs in error.

J. W. Huston, United States district attorney, for the defendant in error.

HOLLISTER, J., delivered the opinion. WHITSON, J., concurred.

This is a suit brought by the United States on an official bond executed by the defendant Alvord, as marshal of the territory of Idaho, as principal, and the other defendants as securities, for the sum of six thousand two hundred and ten dollars and sixty-three cents balance of the sum of twenty thousand dollars, which the complaint alleges Alvord received, to be paid, laid out, and expended in paying the expenses of the several courts of the United States within the territory, and to account therefor to the proper accounting officers of the treasury department, and that he failed to do so, but converted the same unlawfully to his own use. The answer admits the receipt of the money for such purpose, but pleads as a set-off the payment of the same for various other purposes and on various other accounts for which the United States were responsible.

There is a general denial of indebtedness as charged in the complaint, but this denial, when taken in connection with the accounts on which it is claimed the money was expended, must be understood that he is not indebted because such accounts constitute a valid and complete set-off to the plaintiffs' demand.

The answer contains a statement or bill of particulars of the account thus pleaded as a set-off, by which it appears that it consisted of items entirely different from the expenditure which it was his duty to make, as, for instance, two thousand one hundred and two dollars and fifty cents for office rent; five hundred dollars for expenses in pursuit of a person charged with robbing the mail; two hundred and eighteen dollars and fifty cents for guarding prisoners; four hundred and eighty-two dollars and twenty-five cents for expenses in pursuing a person indicted for embezzlement; four hundred and eighty-seven dollars and fifty cents for suppress-

Opinion of the Court—Hollister, J.

ing a riot; three hundred and twenty-six dollars and twenty-five cents for expenses in capturing an escaped criminal; six hundred dollars expenses in taking care of United States property and bringing the same to Boise city; and various other items, none of which, except, perhaps, the sum of one hundred and fifty-three dollars and seventy-two cents, were expended in defraying the expenses of the courts, as it was alleged it was his duty to do.

On the trial the plaintiff's counsel submitted his case to the jury without offering any evidence in support of it, whereupon the defendants moved for a nonsuit, which motion was denied by the court. In this we think the court committed no error, as the plaintiffs by the pleadings were entitled to judgment. The defendants then introduced their testimony, and the jury rendered a verdict against them for three thousand four hundred and fifty-nine dollars and twenty cents, and there was judgment accordingly. Before the case was called for trial, the defendants moved for a continuance on the ground of their inability to prepare for the trial, and because they needed testimony material to the defense.

It appears from the affidavits filed in support of the motion, that defendants had made application to the accounting officers of the treasury department for vouchers, which it was claimed would show the expenditure of the moneys as stated and set forth in the answer, and which had been sent to the department on settlement of accounts, which accounts had been disallowed. The affidavits also showed that like application had been made for a transcript of Alvord's accounts with the government, and that both applications had been denied. The affidavits showed further that information of such refusal had been so recently received that the defendants had not had time to prepare for the trial for want of such testimony. This motion was denied by the court, and exceptions taken to the ruling of the court thereon. We are unable to discover that the court erred in overruling this motion.

The defendants were required to show, not only reasonable diligence in their efforts to procure the testimony, but

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also that they had employed the necessary means therefor. The persons who had the custody of these vouchers, and who alone could furnish the transcript, were beyond the jurisdiction of the court and out of the reach of its process, and it therefore became the duty of the defendants to sue out a commission to take their depositions, and to have attached thereto a copy of the required papers. This they failed to do. It is urged, however, that the vouchers and transcript, being in the possession and under the control of the adverse party, it was bound to furnish them, on request, for the use of the defendants; conceding, for the sake of the argument, that these accounting officers represented the government for this purpose, still the defendants did not pursue the proper method to attain the object.

It is a well-settled rule that if documentary evidence is in the possession and under the control of a party to a suit, which is material to the adverse party, he can not be required to produce it, except upon due notice. If such party has the evidence in his possession in court at the trial, notice upon the trial is sufficient; if not, then the notice must be served in time to enable him to produce it on the hearing of the case. In this case the defendants had no legal right to demand these vouchers of the accounting officers. They became a part of the records or files of the department as evidence of the claims which had been rejected, and as proof of their invalidity, and could not, without detriment to the public service, be withdrawn from the office. The most that defendants could require were office copies of the papers as evidence.

The claim that this was an action *ex delicto*, because the complaint alleges a conversion of the money to Alvord's use, is not tenable. It is true the allegation is not in apt terms to charge Alvord with having received the money to plaintiff's use, yet taken in connection with the whole of the complaint, this is to be considered as its legal effect, and as in no sense the conversion of an action *ex contractu* into one in tort.

On the whole, we discover no error in the proceedings of the court below, and its judgment must therefore be

Affirmed.

Opinion of the Court—Hollister, J.

**AMELLA SLOCUM, RESPONDENT, v. J. H. SLOCUM
AND J. SLOCUM, APPELLANTS.**

APPEAL—NOTICE—PRACTICE.—An appeal to the supreme court can not be taken except by filing the notice thereof with the clerk, and serving a copy thereof upon the adverse party or his attorney.

PRACTICE—SERVICE OF NOTICE OF APPEAL.—The service of the copy of a notice of appeal must be contemporaneous with, or after the filing of the notice; hence, the service upon the adverse party before the filing of the notice is not a sufficient service.

APPEAL—JURISDICTIONAL FACTS.—The filing of the notice of appeal and the service of a copy thereof are jurisdictional facts, and go to the right of appeal.

APPEAL from the district court of the second judicial district, Ada county.

Albert Heed and F. E. Ensign, for the appellants.

Clitus Barbour, for the respondent.

HOLLISTER, J., delivered the opinion. **WHITSON, J.**, concurred.

This is a motion by respondent to dismiss the appeal herein. It appears from the record that notice of the appeal was filed in the clerk's office on the third day of January, 1875, and that the service thereof was made upon the attorney of the appellee on the second day of the same month.

It is provided in section 285 of the practice act (2 Sess. Laws, 134) that "the appeal shall be made by filing with the clerk of the court with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy thereof upon the adverse party or his attorney." By this statute it becomes necessary as a part of the notice that it should be filed, and consequently it must precede or be contemporaneous with the service of a copy on the adverse party. This has been decided in California under a statute similar to ours, and in adopting its statute we adopt the construction which has been given to it by the courts of that state.

Opinion of the Court—Whitson, J.

Before this court can take jurisdiction of an appeal the filing of the notice and the service of a copy thereof as prescribed by the statute must be had, and before the notice is filed, it possesses none of the elements of a notice, and consequently there can be no copy of it. (See 24 Cal. 94; 10 Id. 31; 34 Id. 519; 8 Nev. 177.)

The motion is allowed and the appeal dismissed.

THOMAS NORRIS, RESPONDENT, v. J. D. GLENN ET AL., APPELLANTS.

DAMAGES—POSSESSION OF LAND.—The lawful possession of land is all that is required to enable a plaintiff to recover damages for building a dam across a watercourse running through such land, by reason whereof the water is thrown back upon the land of plaintiff.

PRACTICE—ANSWER—PLEADING—DENIALS.—A denial of the literal truth of the allegations of a complaint, and not a denial of every specific averment in it, is evasive. A failure to deny, specifically, each and every material allegation of a verified complaint, admits the allegations not so denied.

APPEAL from the district court of the second judicial district, Ada county.

J. Brumback, for the appellants.

Prickett & Hasbrouck, for the respondent.

WHITSON, J., delivered the opinion. **HOLLISTER, J.**, concurred.

This is an action in which the plaintiff alleges in his complaint that he was in the lawful possession of certain lots of land therein described, through which ran a certain watercourse from Boise river, and that the defendants built a dam across said watercourse, a little below the plaintiff's land, whereby a backwater was caused that hindered a free course of the water through said watercourse, and caused the waters thereof to flow back on and over the land of the plaintiff, by reason of which he was damaged generally in the sum of one thousand dollars, and specially in the sum of four hundred and fifty dollars.

The defendants deny that they built a dam across any watercourse running through plaintiff's land, as described in his complaint, a little below plaintiff's land, or at any other place; deny that by any dam or obstruction of any kind, they caused a backwater that hindered a free course of any water through plaintiff's land, or caused any waters to flow back on or over plaintiff's land or any part of it, and deny that plaintiff has been damaged in any sum whatever, either generally or specially. A jury trial was had, and a verdict for plaintiff for two hundred dollars, upon which judgment was entered accordingly, from which defendants appeal to this court, and allege as errors:

1. The complaint does not state a cause of action in this, that the simple allegation of possession is not sufficient to sustain the action.

2. The court erred in refusing to give a certain instruction asked by defendant, set forth at length in the statement herein.

The defendant's counsel seems to have abandoned the first assignment of errors, for he makes no mention of it in his brief. The question may be disposed of by the simple statement that it seems to be well settled that possession alone is sufficient to maintain the action. (Ang. on Watercourses, sec. 407, p. 480.) All the instructions asked by defendant are predicated upon the assumption that the answer puts in issue the existence of a watercourse through the lands of plaintiff.

An inspection of the answer discloses the fact that no denial of the existence of a watercourse through plaintiff's land has been made. Defendants only deny building a dam across any watercourse running through plaintiff's land, as described in his complaint, a little below plaintiff's land. They do not deny that there is a watercourse running through plaintiff's land, but that is conceded. They only deny building a dam across such watercourse. This evasive form of denial has long since been held bad, where the complaint is sworn to, both at common law and under the code. (*Smith v. Richardson*, 15 Cal. 501; *Wallace v. Bear River W. & M. Co.*, 18 Id. 461.)

Points decided.

All the instructions asked being requested upon the assumption that an issue had been raised as to the existence of a watercourse running through plaintiff's land, and no such issue being raised, it was not error to refuse them, although the court below seems to have refused them for different reasons, not necessary here to discuss.

No other errors are complained of, and the judgment of the court below must be affirmed.

JAMES GLEDENNING, ADM'R, RESPONDENT, v. DAVID McNUTT AND FRED PHILLIPS, APPELLANTS.

PROBATE COURTS—JURISDICTION.—When the existence of jurisdiction of inferior courts, of which the probate court is one, is proved or conceded, the maxim *omnia rite acta* applies to them as well as to courts of general jurisdiction, and every intendment must be in support of the proceedings.

JURISDICTION—PROBATE COURT.—Jurisdiction of the subject-matter is one thing and the exercise of it another. An irregular or erroneous exercise of its jurisdiction, by a probate court, will not render its proceedings void, but voidable only.

JUDICIAL ACTS—MINISTERIAL ACTS—NON-JUDICIAL DAY.—The act of appointing an administrator of an estate by a probate court is a judicial act, while that of issuing letters of administration is merely ministerial; therefore, the statute, only forbidding the transaction of judicial business on Christmas day, letters issued on that day are not void.

ERRORS WHICH DO NOT PREJUDICE.—Where the district court refused to admit evidence which, if admitted, would have been against the party seeking to introduce it, such party can not avail himself of such refusal as error, even though such evidence should have been admitted.

COLLATERAL ATTACKS—ADMINISTRATOR.—Where an administrator of a deceased person's estate brings an action upon a promissory note due the estate, the authority of such administrator can not be attacked by the defendant, on the grounds that his appointment was irregularly made. Having no interest in the estate, it is a matter of no importance to the defendants, if they would be protected from a second payment of the same sum.

APPEAL from the district court, third judicial district, Lemhi county.

Huston & Gray, for the appellants.

George Ainslie and E. T. Beatty, for the respondent.

Opinion of the Court—Whitson, J.

WHITSON J., delivered the opinion. HOLLISTER, J., concurred.

This is an action brought by James Glendenning, claiming to be administrator of the estate of William Smith, deceased, against David McNutt and Fred Phillips, to recover a balance due upon a promissory note by them to said Smith during his life-time. The complaint alleges the appointment of Glendenning and the performance of the duties of administrator at the time of the commencement of the action by him. The answer puts in issue only the legal and due appointment of Glendenning, and that he ever has had any legal authority to act as such administrator. Judgment was rendered for the plaintiff in the district court in and for Lemhi county; sitting without a jury and from such judgment defendant appeals to this court.

It is claimed by the appellants' counsel that no legal appointment of Glendenning was ever made: 1. Because the precedent steps, required by the statute, were never taken; and, 2. Because the appointment was made on Christmas, a non-judicial day.

In support of both propositions it is urged, that nothing will be presumed in favor of the jurisdiction of an inferior court. The appointment of the administrator may have been irregular, but an attack upon his authority can only be made in cases of this kind, where the appointment is absolutely void. If the appointment is only voidable, in no collateral proceeding can the authority of an administrator to act within the sphere of his prescribed duties be questioned. If the court had such authority and only exercised it irregularly, it can be a matter of no importance to these defendants, as a payment of the amount in controversy to the plaintiff would be a bar to any future liability against them for the same amount. The law can only protect them against the payment of this note in case they might be liable to pay the same a second time.

In the case of *Emery v. Hildreth*, 2 Gray (Mass.) 228, the supreme court decided that "the regularity and sufficiency of the appointment of an administrator by a probate court

Opinion of the Court—Whitson, J.

having jurisdiction to appoint one on the estate, can not be drawn in question in an action brought by the administrator against a stranger, to recover a debt due to the intestate." This authority would seem to be conclusive of the whole subject, supported, as it is, by numerous others of as high a character, did not the appellants claim that the appointment was not only irregular, but void—irregular and void because of the want of many of the steps required by statute in the appointment of an administrator, and absolutely void because the appointment was made on a non-judicial day.

Appellants claim that the court erred in refusing to allow the introduction of the probate record by which they expected to show that all the steps required to be taken by the probate court in the appointment of an administrator were not followed, and that the appointment was therefore void for want of jurisdiction of the probate court. Jurisdiction of the subject-matter does not depend upon the manner of its exercise. The probate court, in the appointment of this administrator, did not want for jurisdiction, for the reason that it might have exercised such jurisdiction irregularly or erroneously, and therefore its proceedings were not void for want of jurisdiction.

In the case of *Cheeps v. Durdon et al.*, in 1 Smith's Leading Cases, the court says, the strictness with which the proceedings of inferior tribunals are scrutinized only applies to the question of jurisdiction, and when the existence of jurisdiction is proved or conceded, the maxim *omnia rite acta* applies to them as well as to courts of general jurisdiction. If, said Tindall, C. J., in *Demster v. Purnell*, it appear on the face of the proceedings that the inferior courts have jurisdiction, every intendment will be made in order to support them, but if it do not so appear, if the point be left in doubt, no such intendment will be made. Can there be any doubt in this case that the probate court had jurisdiction to appoint an administrator of the estate of a deceased person?

Most of the cases cited by appellants' counsel are those in which inferior courts had gone beyond the jurisdiction conferred upon them; in other words, had done too much;

Points decided.

while in the case at bar the probate court had done too little.

The only remaining question is, Was the appointment of Glendenning made on a non-judicial day? If such was the case, there would be no question but that it would be void. The letters appear to have been issued December 25, 1871, and the court refused the introduction of any further evidence upon the subject of the appointment. Had the court allowed the introduction of the probate record, it would have shown that the administrator was not appointed on Christmas, but on the day following.

The act of appointing was a judicial act; the act of issuing letters merely ministerial. The statute does not prohibit a ministerial act on a non-judicial day, but only judicial acts. The record presents the strange anomaly of the letters having been issued the day before the appointment was made, or before the letters were granted. In this respect, the error complained of by appellants is one which, if committed, was in their favor, because the record would have shown the letters to have been granted on the twenty-sixth, and not on the twenty-fifth, of December; and it is well settled that no error can be taken advantage of by a party not injured thereby.

In support of the right of this administrator to bring this action, the only question is, was his appointment void? If not, but only voidable, then his authority can not be attacked collaterally, but only by direct proceedings by some one beneficially interested in the estate.

Judgment of the court below is affirmed.

WESTON RALSTON AND JOHN WEST, RESPONDENTS,
v. K. P. PLOWMAN, APPELLANT.

MINING LAW—DAMAGES.—In the absence of any agreement, regulation, or custom authorizing it, one person has no right to run his tail-race or sluicing-flume on to the dumping-ground of another who had a prior right thereto, and no damage can be claimed of the latter for filling up such race or flume, if he do not prevent the former from dumping on his own ground.

Opinion of the Court—Whitson, J.

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than parol testimony. To admit evidence of a secondary
character where higher evidence of the fact is attainable,
against the objections of the opposite party, is erroneous.
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Division of the Court—Hollister, J.

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the "dump" therefrom was altogether on defendant's ground,

and was two hundred feet below the grounds of the plaintiffs.

The defendant had also constructed a flume of like char-
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Opinion of the Court—Hollister, J.

EVIDENCE.—Parol evidence can not be given of a mining custom, when there are written rules or regulations of the mining district in force on the same subject.

INSTRUCTIONS.—It is erroneous to instruct a jury to find a verdict according to mining customs, "if such customs are not contrary to law." It is likewise erroneous to instruct a jury, if they believe the version of the case by one or the other party to be correct, they will find in his favor.

JURY MUST FIND FACTS—COURT MUST GIVE THE LAW.—A verdict must be supported by the facts found by the jury, and the law must be given to them by the court.

APPEAL from the district court of the second judicial district, Boise county.

George Ainslie, and Huston & Gray, for the appellant.

R. E. Foote, for the respondents.

HOLLISTER, J., delivered the opinion. WHITSON, J., concurred.

In this case the court permitted parol evidence to be given of the local mining customs, when it appears from the record that the regulations of the locality or mining district were recorded in the proper office, according to the laws relating thereto. The court gave to the jury an instruction that they were to find a verdict according to the mining customs, if such customs were not contrary to law.

In both these respects we think the court erred. It is well settled, that where there is record evidence which can be obtained of any fact material to the issues, such evidence can only be received because it is of a higher character than parol testimony. To admit evidence of a secondary character where higher evidence of the fact is attainable, against the objections of the opposite party, is erroneous. It was not competent for the jury to determine for themselves whether mining customs were or were not contrary to law. This was a question of law, for the court to determine, and should have been settled as such before giving the case to the jury. If the customs were contrary to law, they had no validity, and should not have been given to the jury to pass upon. If not contrary to law, the jury should

Opinion of the Court—Hollister, J.

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The defendant had also constructed a flume of like character from his diggings to a point on his own claim, which he used for dumping purposes, not far distant from the place where plaintiffs' flume or race ended, and that the tailings or "dump" of the defendant had filled up or obstructed the plaintiffs' flume to a distance of about one hundred feet, but still a hundred feet or more below the lower line of their claim. It was for this obstruction the plaintiffs brought their suit and recovered their judgment against the defendant. The evidence showed that the possession and ownership by the defendant, of his claim and dumping-ground, was prior in point of time to that of plaintiffs, and that no right had been given by the defendant to

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R. E. Foote, for the respondents.

HOLLISTER, J., delivered the opinion. **WHITSON, J.**, concurred.

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have been instructed that upon finding certain facts, they should find accordingly in their verdict.

The court also instructed the jury if they found the plaintiffs' version of the case to be correct they should find a verdict in their favor. This was erroneous. A verdict is not to be determined by the opinions or views of the jury as to what a party's version of a case may be. Such version may or not be supported by the evidence. It may be entirely erroneous, and, hence, can not be made the foundation of a verdict, unless the facts which the jury find, support it. The pleadings in a case only make the issues which are presented for the consideration of the jury, and not the evidence upon which the verdict is to rest, and it is for the court to say what facts, if found by the jury from the evidence, shall be sufficient to maintain the case of either party. The court should instruct the jury, if they find from the evidence such and such facts to be established, then their verdict will be for the party, whichever one it may be in whose favor they were found. It appears from the evidence in the case that the plaintiffs had constructed a race or covered flume through which they sluiced their tailings from their mines; that such flume run from their diggings (which were situated above the defendant's mine) some two hundred feet upon the defendant's dumping ground, and that the "dump" therefrom was altogether on defendant's ground, and was two hundred feet below the grounds of the plaintiffs.

The defendant had also constructed a flume of like character from his diggings to a point on his own claim, which he used for dumping purposes, not far distant from the place where plaintiffs' flume or race ended, and that the tailings or "dump" of the defendant had filled up or obstructed the plaintiffs' flume to a distance of about one hundred feet, but still a hundred feet or more below the lower line of their claim. It was for this obstruction the plaintiffs brought their suit and recovered their judgment against the defendant. The evidence showed that the possession and ownership by the defendant, of his claim and dumping-ground, was prior in point of time to that of plaintiffs, and that no right had been given by the defendant to

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plaintiffs to dump their tailings on his ground. Under such a state of facts we are clearly of the opinion, the plaintiffs had no right of action for the filling up of their flume so long as the defendant did nothing to prevent them from dumping on their own grounds. Their race was extended without any right, upon the defendant's grounds, and, so far as the evidence shows, without any necessity. The fall from their washings or mining operations to the lower line of their claim was sufficient to carry off their tailings and to dump them on their own grounds, and under no conceivable circumstances could they claim the right of carrying their flume on to the defendant's premises for the purpose of dumping their tailings thereon without his authority.

For these reasons we are of the opinion the judgment of the court below should be reversed and remanded for a *venire de novo*.

P. B. HAWKINS ET AL., RESPONDENTS, v. WILLIAM
L. THURMAN, APPELLANT.

SPECIAL PERFORMANCE—VENDOR'S LIEN—PRACTICE.—A decree for a specific performance in a suit brought to enforce a vendor's lien, can not be upheld.

VENDOR'S LIEN—SECURITY.—A vendor's lien can not be enforced for the purchase money of a tract of land, when the parties have stipulated in their contract for other security. It is only in cases where no security is taken, except that which the law gives, that a vendor's lien attaches to the land.

APPEAL from the second judicial district, Ada county.

Prickett & Hasbrouck and J. W. Huston, for the appellant.

J. Brumback, for the respondents.

HOLLISTER, J., delivered the opinion. WHITSON, J., concurred.

This is a proceeding in equity instituted in the district court of Ada county, which seems to be somewhat of a complex nature, but from an attentive examination of the pleadings we have had but little difficulty in ascertaining its true character.

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It appears that Pendleton B. Hawkins and one Jesse A. Hawkins entered into a contract in writing, under seal, on the fourteenth day of December, 1869, with the appellant, by which it was agreed that the two Hawkinses had sold to the appellant and let into the possession thereof, certain tracts of land lying in Ada county, for the sum of six thousand five hundred dollars, in gold coin, three thousand dollars of which the appellant was to pay on or before the first of June, 1870, and the remainder on or before the first of March, 1871, with a stipulation therein that if default should be made in the payment of the purchase money, or any part thereof, the appellant should pay on the sum due, interest at the rate of three per cent. per month, and with a further stipulation that at the option of the vendors, if default should be made in the payment of the purchase money, the vendors might re-enter and take possession of the land, and that all payments which have been made should become forfeited.

It further appears, as is alleged in the complaint, that the appellant failed to make the last payment, although, it is alleged, the vendors had complied with the terms of the contract on their part by tendering to him a deed for the land as agreed upon. There is a further allegation in the complaint that there was a mistake made by the parties in the contract, in the description of some portion of the land conveyed, which the court was asked to correct by its decree; so that it might conform to the intention of the parties. On the hearing the court entered a decree accordingly.

Except in so far as the suit was brought to correct the above-mentioned mistake, the complaint shows that it was instituted to enforce a vendor's lien to secure the payment of the balance of the purchase money remaining unpaid, and costs and expenses, etc., and the prayer in the complaint was that the lien should be established by decree and the land subjected to sale to satisfy the debt, etc.

On a hearing upon the pleadings and proofs, the court made and entered a decree for a specific performance, by the terms of which the appellant was required to pay within

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a specified time, to the clerk of the court, for the benefit of the vendors, the sum of three thousand five hundred dollars, and interest thereon at the rate of three per cent. per month, in gold coin, for one year prior to the entering of the decree, and that on such payment deed for the land should be executed and tendered to Thurman.

The counsel, in presenting the case to us, have urged various reasons for and against a reversal of the judgment, but we deem it unnecessary to consider more than one or two, as in our view there is but one point on which our decision must rest.

It is conceded by the counsel for the respondents, and certainly it is so alleged in the complaint, that, except as to that portion of it which seeks a reformation of so much of the contract as relates to the misdescription of the land, it is an action brought for the enforcement of a vendor's lien, and not, as it seemed to the court below, a suit for a specific performance. In the view thus taken by the pleader, we entirely concur. The complaint alleges a full performance by the vendors of their part of the agreement, and charges a failure on the part of Thurman to fully perform his part of it, and they seek to obtain by a decree of the court an order for the sale of the land, for the purpose of securing the payment of the purchase money still due, and it necessarily follows that the decree for a specific performance can not be upheld.

Though not necessary to a determination of the questions involved in the case at bar, it still is important, in view of the rights and interests of the parties, and which may be involved in a future proceeding, to express our views upon the law in relation to vendors' liens and its application to the case made by the complainants in this action. It is well settled that on a sale of lands, where, by the agreement of parties, provision is made for the security of the purchase money in some other way than by a lien upon the lands, such lien does not attach by operation of law, and the vendor can not resort to it for security. When, however, no security is agreed upon, the law creates an equitable lien in favor of the vendor, which he can enforce in a court of

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equity, when there is a default in the payment of the purchase money. In this case, it is apparent, such a lien does not attach. By the terms of the contract, the vendors had secured to themselves a triple security, either one of which is deemed in law to be sufficient to insure the payment of the purchase money, without resort to the land, and which they could enforce by legal proceedings.

It will be seen, that on the failure by the vendee to make the payments, or any portion thereof, he could be required to pay three per cent. per month interest on the sum unpaid, as liquidated damages, and moreover, that the vendors could re-enter and take possession of the lands, and declare a forfeiture of any moneys that had been paid by the vendee. It is apparent, therefore, from this view of the case, that the complainants showed no equities which entitled them to a decree for the sale of the land.

In the view we have taken of the case, the decree of the court for a specific performance must be reversed and remanded, and so much of it as reforms the contract, relating to the misdescription of the lands, be affirmed.

JORDAN W. HYDE, RESPONDENT, v. H. O. HARKNESS, APPELLANT.

PLACE OF TRIAL—CHANGING—PRACTICE.—The question of changing the place of trial in order that the defendant may have an impartial trial, involves an issuable fact, and when an application is made for that purpose upon affidavits, it is proper to admit counter-affidavits to enable the court to judge of the necessity for such change.

IDEM—BURDEN OF PROOF.—The burden of showing that an impartial trial can not be had is on the party making the application, and even if there is a slight preponderance of evidence in favor of the application, this court will not reverse the action of the court below for that reason.

IDEM—DISCRETION.—Granting a change of venue is a matter in the sound discretion of the court, and will not be reviewed except in cases of abuse.

APPEAL from the district court, third judicial district, Oneida county.

L. P. Higbee, for the appellant.

F. E. Ensign and Huston & Gray, for the respondent.

Opinion of the Court—Whitson, J.

WHITSON, J., delivered the opinion. HOLLISTER, J., concurred.

This is an appeal under section 295 of the civil practice act from an order of the district court of Oneida county, refusing to change the place of trial under subdivision 2 of section 21 of the same act. The errors complained of by the appellant, committed by the court below, are: 1. In hearing and considering the counter-affidavits of the plaintiff in opposition to the motion, and affidavits of the defendant to change the place of trial of the action. 2. In refusing to grant the motion to change the place of trial.

It is contended by appellant's counsel that there have never been any adjudications as to the right of a party to file counter-affidavits in opposition to a motion for a change of venue, but that it is simply a matter of practice, to be regulated by this court for the direction of the district courts. If this position be correct, the court below could commit no error until some practice is established on the subject, because an inferior court can not be held to account for an error in the absence of law or the precedence of a higher court against the action complained of. But we can not agree with the learned counsel for the appellant that there have been no adjudications on this point. The supreme court of California, in the case of *Pierson v. McCahill*, 22 Cal. 127, say: "The granting of time to file counter-affidavits, on a motion to change the place of trial, is a matter of discretion in the lower court, and will not be reviewed on appeal." On the well-known principle that the greater includes the less, we can come to no other conclusion than that if it is no error to grant time to file counter-affidavits, it can be no error to allow them to be filed, and as a consequence allow them to be used on the hearing of the motion. In fact, the right seems never to have been doubted in California under a statute identical with ours. The right seems to have been conceded without objection from any quarter. The question of granting a change of venue is an issuable one, to be tried by the court as any other issue of fact, and it would be making the ends of jus-

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tice depend too much upon the say-so of one party to allow that party to make a showing without any right of the other party to controvert it.

The position of appellant's counsel, that if the court believe from facts stated by the applicant for a change of the place of trial that the applicant has reason to believe an impartial trial can not be had, the change should be granted, can not, we think, be sustained. The same doctrine, if followed up, would require the court to give judgment for the plaintiff, in all cases, if the court believed, from the facts and circumstances, that he was sincere in the prosecution of his suit.

The statute says, the court may, on motion, change the place of trial when there is reason to believe that an impartial trial can not be had in the county where suit has been commenced. It would be placing too much power at the disposal of litigants to give any other construction to this statute than that it must be the court that has reason to believe an impartial trial can not be had before a change of venue will be granted. This view of the case is sustained in the case of *Watson v. Whitney*, 23 Cal. 375, in which the court says: "The granting or refusing of a change of venue by reason of the bias or prejudice of the citizens of the county is discretionary with the court, subject to revision only in cases of abuse."

In this case we fail to see where the court was guilty of any abuse in refusing to grant a change of venue. Even if there was a slight preponderance of evidence presented by the affidavits for a change, it could not, therefore, be contended that there was any abuse of discretion in the court below. But we do not think that there is even a preponderance of evidence appearing from the affidavits in support of the proposition that a fair and impartial trial could not be had in Oneida county.

The affidavits in support of the motion, it is true, state that there is a strong prejudice against defendant, and that the affiants do not believe he can have a fair and impartial trial; but the counter affidavits, while they do not deny that there is some prejudice against the defendant, deny the facts

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stated in the affidavits in support of the motion, that defendant can not have an impartial trial in Oneida county, and allege positively that there would be no difficulty in obtaining an impartial trial. The counter affidavits also state the reasons for the belief on the part of the affiants, that defendant can have an impartial trial.

For these reasons the order refusing to change the place of trial is affirmed, and cause remanded for trial.

W. S. STEVENS, APPELLANT, v. THE NORTH-WESTERN STAGE CO., RESPONDENT.

MOTION FOR NEW TRIAL—PRACTICE.—Three steps are necessary in moving for a new trial: 1. Giving notice of intention to make the motion. 2. Filing the statement or affidavits upon which the motion is to be made. 3. The application or motion.

IDEM—WAIVER.—A failure to give notice of intention to move for a new trial or to file the statement within the time required by law, or such further time as the court or judge may, by order, grant, is a waiver of the right to move for a new trial; and the failure can only be remedied by the appearance of the opposite party without objection to such defects, at the settlement of the statement, or on the hearing of the motion.

IDEM.—In case the parties can not agree upon the statement, notice must be given for a settlement before the court or judge, by the party proposing the statement, but it must affirmatively appear that no notice was given, or this court will presume that it was given.

ORDER STAYING EXECUTION—EXTENDING TIME.—An order "that there be a stay of execution on the judgment in this case for a period of twenty days for the purpose of allowing the defendants to move for a new trial" is not an order extending the time for giving notice of intention to move for a new trial, or for filing a statement.

CONSTRUCTION—PRESUMPTIONS.—This court can not place a construction upon an order of the court below not warranted by its language, or indulge in presumptions or surmises not warranted by the fair import of the words used.

NEW TRIAL—STATEMENT—PRACTICE.—The statement on a motion for a new trial must be settled, before a decision on the motion, in order that the court below or judge thereof may have something definite and certain to act upon. The practice of deciding the motion and afterwards settling the statement, condemned.

APPEAL from the district court of the second judicial district, Ada county.

Opinion of the Court—Whitson, J.

Prickett & Hasbrouck and J. Brumback, for the appellant.

Huston & Gray, for the respondent.

WHITSON, J., delivered the opinion; HOLLISTER, J., concurring therein.

This is an appeal from an order of the district court of Ada county, granting a new trial. The only errors complained of, which we deem it necessary to consider, are, substantially: 1. That no notice of an intention to move for a new trial was given within five days after the rendition of the verdict. 2. That no statement was filed within the five days after such notice of intention should have been given, and the time for filing the statement was not extended by court or judge. 3. That no notice had been given to settle the statement, and that the same had not been settled when the motion for a new trial was decided.

The respondents rely upon the following order of the court below, as extending the time for giving the notice of intention to move for a new trial and the filing of a statement: "Ordered, that there be a stay of execution on the judgment in this cause, for a period of twenty days from this date, for the purpose of allowing the defendants to move for a new trial." The court below gave the construction to the order claimed by the respondents. This, we think, was clearly error.

Three steps are necessary in procuring new trials:

1. Giving notice of intention to move for a new trial. This must be done within five days, unless the time be extended under section 485 of the civil practice act.

2. Filing statement or affidavits to be read on the hearing. This must be done within five days after giving the notice of intention, or within such further time, not exceeding twenty days, as the court or judge may by order grant. (*Harper v. Minor*, 27 Cal. 108.)

3. The application or motion for the new trial, which must be at the earliest practicable period after filing the affidavit or statement.

The order under which it is claimed that the time for

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serving notice of intention to move for a new trial is extended for twenty days, only extends the time for the purpose of allowing defendants to move for a new trial. It does not extend the time for serving notice of intention to move for a new trial. It only extends the time for taking the last step, and not the first. It may have been the intention of the court below to extend the time for serving notice of intention to move for a new trial, but this court can not place a construction upon an order of the court below not warranted by the language itself. We can not indulge in presumptions and surmises not warranted by the fair import of the words used. The notice of intention to move for a new trial not having been given within the five days, and this order failing to extend the time for that purpose, the right of the defendants to move for a new trial was waived, unless the plaintiff, by appearing and resisting the application for a new trial, waived his right to notice, which we find he did not do, for he reserved the right to object to the regularity of the proceedings and appeared for that purpose only, as appears from the record. (*Cuttle v. Leitch*, 43 Cal. 321.)

The second question presented, the filing of the statement, is so intimately connected with the first, that it is only necessary to say that a failure to proceed properly in the first instance would render every subsequent act of no effect, unless the defect was waived by some act of the plaintiff, which, as we have before remarked, has not been done.

As to the third question, the rule seems well established, that while under the statute notice must be given for the settlement of a statement before the judge, by the party proposing the statement, if the parties can not agree, the presumption will be in favor of the notice having been given, in the absence of any evidence to the contrary. In this case, however, it appears affirmatively that no notice for the settlement of the statement was given, and therefore the presumption that there was notice is overcome, as appears from the record. (*Battersby v. Abbott*, 9 Cal. 568.)

Again, it appears that the statement was not settled un-

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til after the decision of the court upon the motion, for the order of the court granting a new trial and the plaintiff's exceptions thereto are incorporated into and form a part of the statement itself. This practice can not be too strongly condemned. The whole theory of the use of a statement is that the court may have something definite and certain upon which to act. Any other practice would lead to great confusion and give rise to controversies as to what state of facts the court had acted upon after the very questions in issue had been decided.

A case should first be made up certain and complete, and then the court or judge can decide it intelligently. (*Waggenheim v. Hook*, 35 Cal. 216.)

The order of the court below granting a new trial must be reversed.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

JANUARY TERM, 1876.

PRESENT:

HON. M. E. HOLLISTER, CHIEF JUSTICE.

HON. JOHN CLARK, JUSTICE.

S. C. THOMPSON, PLAINTIFF, *v.* N. B. HOLBROOK,
DEFENDANT.

TOWN LOTS—OCCUPANCY.—In order to entitle a person to a deed for lots or lands in the city of Lewiston from the mayor of the city, he must be an occupant thereof, and the occupancy must consist of an actual residence thereon according to its legal subdivision into lots, blocks, etc.; an inclosure of the subdivision or a part thereof, or some permanent improvement thereon at the time of his application for the deed.

IDEM—OCCUPANCY.—An occupancy of one legal subdivision does not draw to it another legal subdivision, though contiguous to or immediately adjoining it.

IDEM—IMPROVEMENTS—ABANDONMENT.—If a person has at one time been an occupant of a lot within the meaning of the law, by erecting an inclosure around it, but before his application for a deed has suffered such inclosure to be destroyed by freshets or taken away by tenants, so as to leave the lot open to the public, he shall be deemed to have abandoned it, and another person may enter thereon and become an occupant, so as to entitle him to a deed from the mayor.

CERTIFIED from the district court of the first judicial district, Nez Perce county.

Opinion of the Court—Hollister, C. J.

No attorneys of record.

HOLLISTER, C. J., delivered the opinion. CLARK, J., concurred.

This is a case adjourned from the district court by Nez Perce connty, on doubtful questions and principles of law, and the only question to be determined is, which of the parties is entitled to a deed from the mayor of the city of Lewiston, for certain lots in said city, described in the pleadings. Both parties claim to be *bona fide* occupants of the lots in question, and entitled to deeds therefor under the provisions of an act entitled "An act to provide for the survey, platting, and disposal of the land in the city of Lewiston, Nez Perce county, Idaho territory, pursuant to the United States statutes made and provided," approved January 8, 1873, and both have filed their applications to the mayor for deeds under it, the defendants being first in point of time.

It appears from the evidence that the plaintiff purchased in November, 1866, of A. H. Robie, a tract of land described by metes and bounds, embracing the lots in controversy, to wit, lots 5 and 8, in block 6, as afterwards surveyed, and that at the time of the purchase there was a sawmill on the land, but on what portion it does not appear, which was afterwards removed. The plaintiff testifies that he caused the tract to be fenced in, and that it was only a short time since last spring (1875), that he had notice that defendant claimed the property.

The evidence shows that plaintiff rented, to one Holt, his house, standing on lot 6, in the same block, and that Holt, during the first year of his occupancy, cultivated the "big lot," as he termed it, to wit, the premises in controversy, and that plaintiff furnished the seed. Before the expiration of Holt's tenancy most of the fence which plaintiff had built on the tract was swept away by a freshet, and when defendant entered upon the lots, there were but few posts standing thereon, that they were open to the public, and were used for camping grounds by teamsters. While in this condition, the defendant took possession of the lots in

April, 1874, and fenced them in, and has continued to occupy them since. Lot 6, on which the house of plaintiff stands, was fenced in separately, after the freshet, and was occupied by tenants.

Section 1 of the act referred to provides that the mayor shall cause to be made and filed in his office, a plat of the land, divided into blocks and lots, to such an extent as may by him be deemed requisite, and into divisions of acres and parts of acres at his discretion, the exterior lines of the remaining part of said land shall be run, marked, and platted on the plat of the city.

It is provided in section 3 of the act, that the claimants of title to such portions of the land as shall be claimed by them shall state that they are *bona fide* occupants of the described portion of the land and the lots, and fraction of lot or lots, block or blocks, and fraction of block or blocks, acre or acres, or fraction of acre or acres included in each claim, and in what said occupancy consists, which shall be either actual residence thereon, inclosure, or some permanent improvement on some portion of the lot or lots, block or blocks, acre or acres, or the fraction of the same lying contiguous, and describe such land and the improvements thereon, in said application, in accordance with the plat of said land as recorded in the county recorder's office, etc.

It is evident from this provision of the act, that a person, to be entitled to a deed from the mayor for a lot, block, or portion of the land embraced in the town-site of the city of Lewiston, must be an occupant within its meaning, and that such occupancy must consist of an actual residence on the portion claimed, according to its legal subdivision of lots, blocks, acres, or fractions thereof, or by an inclosure or some permanent improvement thereon at the time of the application, and that such occupation on one legal subdivision does not draw to it another subdivision, though adjoining or contiguous thereto. If the legal subdivision be a lot, and it is only occupied by the claimant in the mode prescribed, this gives the claimant no right to an adjoining lot, and so of blocks, fractional blocks, acres, etc. If the occupancy embraces more than one lot in the same block,

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the claimant would be entitled to a deed for the whole, and so of blocks, acres, etc., with this limitation, perhaps, that where a street intervenes between blocks, lots, etc., the claim can not go over or beyond it.

In this view of the law, I think the plaintiff is not entitled to a deed. It is true at one time he was an occupant of the lots in question, within the meaning of the law, but this was before the survey and platting of the town-site into lots, blocks, etc., and before the defendant took possession, he had ceased to be an occupant, inasmuch as the lots were not inclosed nor were there permanent improvements thereon, neither did he reside on either of them. In fact, as the evidence shows, they had become vacant, and were open to the use and occupancy of any one who might choose to go thereon, and that in contemplation of law the plaintiff had abandoned them and relinquished all claims he might have had to them by reason of his purchase from Robie, and his inclosure after the purchase.

This being the proper view of the case so far as it relates to the plaintiff's right, it necessarily follows that the defendant had the legal right to take possession of the lots and to make the improvements required by the law to entitle him to a deed. This he has done. The judgment of the court therefore is, that the cause be remanded to the district court of Nez Perce county, with directions to enter a decree that the defendant is entitled to a deed from the mayor of Lewiston, for the lots in controversy, and that the plaintiff be restrained from setting up any claim thereto, as against the rights of the defendant. It is further ordered that the plaintiff pay the costs of the proceedings in this court.

W. G. LANGFORD, RESPONDENT, v. C. E. MONTEITH,
APPELLANT.

NEZ PERCE INDIANS—RESERVATION—TREATY.—The treaty between the United States and the Nez Perce tribe of Indians, concluded June 9, 1863, proclaimed April 20, 1867, reserved for the sole use and occupation of said tribe, the territory, or tract of country therein described.

IDEM—SETTLERS UPON THAT RESERVATION ARE TRESPASSERS.—Settlers upon the reservation granted by treaty to the Nez Perce Indians and all

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others, except such as are permitted by the treaty, who go thereon to occupy or possess any portion of the land embraced therein, are trespassers. No agreement for the use and occupancy of any portion of said land between the plaintiff and another white person, can be enforced.

APPEAL from the first judicial district, Nez Perce county. On the fifteenth day of February, 1875, the plaintiff commenced an action before a justice of the peace, as landlord, against the defendant, as his tenant, for holding over lands within the Nez Perce Indian reservation, contrary to the terms of a lease previously entered into between plaintiff and defendant. The action was commenced and prosecuted under that provision of the civil practice act relating to forcible entry and detainer. The cause was removed from the justice's court to the district court of the first judicial district, Nez Perce county, where judgment was rendered in favor of the plaintiff. Defendant appealed.

Huston & Gray, for the appellant.

Brumback & Cahalan, for the respondent.

CLARK, J., delivered the opinion. HOLLISTER, C. J., concurred.

From the pleadings, judgment, and admissions of counsel for the respective parties made in this court, it is shown, that the premises described in the complaint, lease, and judgment, are situated within the Nez Perce Indian reservation; hence our inquiries are directed to an examination of the several treaties between the United States and the Nez Perce tribe of Indians for the purpose of ascertaining what rights and privileges the respondent had, if any, to land and tenements situated as aforesaid, and the further purpose of ascertaining whether, or not, the action of forcible detainer could be maintained between white persons for lands and tenements which are made a part of an Indian reservation by treaty with the United States, and reserved to the sole use and occupation of Indians.

The treaty between the United States and the Nez Perce tribe of Indians, concluded June 9, 1863, proclaimed April 20, 1867 (14 U. S. Stat.), was made in the valley of

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the Lapwai, Washington territory, as appears by the preamble to said treaty. This territory was not created at the date of said treaty, but afterwards, and when created, included said Lapwai valley within its limits. The treaty mentions the Lapwai and shows it to be within the reservation; hence we conclude that Lapwai creek, mentioned in the complaint, lease, and judgment, and Lapwai, mentioned in the treaty, are one and the same place. Article 1 of said treaty provides, that the Nez Perce tribe of Indians relinquish, and do thereby relinquish to the United States, the land reserved for the use and occupation of said tribe under the treaty of 1855, saving and excepting so much thereof as is described in article 2 of the said treaty of June 9, 1863.

Article 2 of the treaty of June 9, 1863, reserves for the home and for the sole use and occupation of said tribe the tract of land included within the following boundaries, to wit: Commencing at the north-east corner of Lake Waha and running thence northerly to a point on the north bank of the Clearwater river, three miles below the mouth of the Lapwai, thence down the north bank of the Clearwater to the mouth of Hatwai creek, thence due north to a point seven miles distant, thence eastwardly to a point on the north fork of the Clearwater seven miles distant from its mouth, thence to a point on Oro Fino creek five miles above its mouth, thence to a point on the north fork of the south fork of the Clearwater five miles above its mouth, thence to a point on the south fork of the Clearwater one mile above the bridge on the road leading to Elk city (so as to include all the Indian farms now within the forks), thence in a straight line westerly to the place of beginning. This description shows the premises mentioned in this action to be within the reservation.

Article 3 of said treaty of June 9, 1863, provides that the president cause boundary lines to be marked and lands within the reservation surveyed into lots for the purpose of dividing the land among the heads of Indian families for their use and benefit; article 3 further provides that such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee, or leased, or otherwise disposed of,

only to the United States, or to persons then being members of the Nez Perce tribe and of Indian blood, with permission of the president, and under such regulations as the secretary of the interior or the commissioner of Indian affairs shall prescribe. Article 4 of the treaty provides for the payment to the tribe for the relinquishment of land to the United States under this treaty.

This treaty provides for the erection of churches, schools, hospital, blacksmith-shop, houses, and mills, for the use and benefit of the tribe; also provides that the United States employ teachers, matrons, mechanics, and millers, to operate the several establishments mentioned. It further provides that the United States is the only competent authority to declare and establish roads and highways, and that no other right is intended to be granted to the citizens of the United States than the right of way over such roads or highways; that upon such roads there may be established, at such points as may be necessary for the public convenience, hotel or stage stands, under license from the agent or superintendent. It is further provided that the ferries and bridges shall be held and managed for the benefit of the Indians.

Under the tenth article of the treaty of June 11, 1855, it is provided that certain land described in William Craig's notice to the register of the land-office of the territory of Washington, shall not be considered a part of this reservation, except that it be subject to the operations of the intercourse act. This land is the only land within the boundaries of the Nez Perce reservation not included and made a part of the land reserved for the sole use and occupation of the tribe. There are no reservations or exceptions in favor of any other person or persons than William Craig. No "mission claim" is mentioned in said treaties, but, on the contrary, all land is reserved to the sole use and occupation of the Indians, except the land of Craig.

Under the provisions of the treaties white persons are not allowed upon the reservations, except they be in the employ of the United States, or keepers of road stations, or ferries, as provided by treaty, all of such persons being

Opinion of the Court—Clark, J.

under the control and direction of the United States Indian agent. The plaintiff in this action does not show that he is in any way or manner entitled to the use or occupation of any land within the reservation.

It is provided by section 2118 of the revised statutes of the United States, that every person who makes a settlement on any lands belonging, secured, or granted by treaty with United States to any Indian tribe, or survey, or attempt to survey such land or designate any of the boundaries by marking trees or otherwise, is liable to a penalty of one thousand dollars. The president may moreover take such measures, and employ such military force as he may judge necessary to remove any such persons from the lands.

From the foregoing treaty stipulations, and the law above cited, we must conclude that the plaintiff in this action was a trespasser upon the Nez Perce Indian reservation, and not entitled to the use or occupation of any land therein, that any lease or agreement made between him and any white person for the use or occupation of the reservation land was void *ab initio*, and that courts of law have no power to restore possession of any premises or land leased as aforesaid. Article VI. of the constitution of the United States provides as follows, to wit: "This constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Chief Justice Marshal in *Worcester v. The State of Georgia*, 6 Pet. (U. S.) says, that the Indian natives had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which

Points decided.

those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among the powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

We are compelled to come to the conclusion above stated, that plaintiff in this action was a trespasser upon the Nez Perce reservation, without any right whatever to enter into contracts for the use and occupation of Indian land reserved under treaty, and that if he did make such agreements, the same could not be enforced in the courts of this territory, for the reason that the Indians had the sole right to use and occupy such land, or premises, and the courts were bound to protect them in the same.

It is therefore ordered that the judgment of the court below be reversed and the action dismissed, and that appellant have judgment for his costs in this behalf.

THE MONARCH G. & S. M. CO., APPELLANT, v. PETER McLAUGHLIN ET AL., RESPONDENTS.

NEW TRIAL—EVIDENCE, INSUFFICIENCY OF—INSTRUCTIONS—PRESUMPTIONS.

When written instructions are not given to the jury, this court will presume that the law of the case was correctly given, unless the contrary appears; but when there is a great preponderance in the weight of evidence against the verdict, this court will presume that the jury misconceived either the evidence or the law, and will order a new trial.

APPEAL from the second judicial district, Alturas county.

Brumbach & Cahalan and V. S. Anderson and Geo. Ainslie,
for the appellant.

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R. A. Sidebotham and H. E. Prickett, for the respondents.

CLARK, J., delivered the opinion. HOLLISTER, C. J., concurred.

There are only two material grounds of error assigned in this case: 1. Insufficiency of the evidence to justify the verdict. 2. That the jury misapplied the law to the facts in order to find a verdict for defendants.

On the first ground, the general rule is, that this court will not disturb a judgment, or verdict, or finding, or order denying a new trial, or granting a new trial, where there is a substantial conflict of testimony, and no law appears to have been violated. This court will not attempt to weigh the evidence and decide between conflicting statements; but it will always review the evidence if the point is made that the verdict or judgment is contrary to the evidence, and if they find there is a substantial conflict of the same so that the jury might find either way without becoming obnoxious to the charge of passion, prejudice, misconception, or caprice, the verdict will not be disturbed.

On the second ground, the record shows that the court below instructed the jury orally. Either party may require that the court deliver its instructions to the jury in writing, which was not done. In such case this court will presume that the law of the case was correctly given.

The record in this case is voluminous, and clearly shows a great preponderance of the weight of evidence against the verdict; therefore, in the absence of written instruction to the jury, and while the presumption in the favor of the correctness of the same is entertained, we are constrained to the opinion that the jury must have misconceived the law or the facts, or were influenced by passion or prejudice, in order to find the verdict in this action.

In order that justice may be done in the premises, the order of the court below denying a new trial is reversed and a new trial ordered.

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THE PEOPLE PLAINTIFFS, v. M. B. WILKERSON ET
AL., DEFENDANTS.

ASSESSMENT—TAXATION.—If real estate and personal property have been assessed in a doubtful or disputed territory by two counties, the tax may be paid in the county where the land is actually located, and such payment will bar an action brought for the taxes in the other county.

LEGISLATIVE POWER—ASSESSMENT—TAXATION.—It is competent for the legislature to provide for the assessment and collection of taxes by either of two counties in a disputed or doubtful district, when it is left optional with the taxpayer to pay the taxes in the county where the land is actually situated.

IDEM—DEFENSES.—It is also within the power of the legislature to define by law the grounds upon which a party sued for his taxes may set up a defense.

CERTIFIED from the district court of the second judicial district, Ada county.

F. E. Ensign, district attorney, for the plaintiffs.

Huston & Gray, for the defendants.

HOLLISTER, C. J., delivered the opinion. CLARK, J., concurred.

This case was adjourned to this court from the district court of Ada county, upon the certificate of the judge of that court in conformity with the statute, that questions of law arising therein might be settled by the court. The respondents were assessed upon their real estate and personal property for the taxes of 1872, in Ada and Idaho counties, and on their refusal to pay them to the collector of Ada county, a suit was instituted against them and their real estate, by the district attorney, before a justice of the peace of said county, and a judgment entered against them, from which they appealed to the district court. The respondents claim that at the time of the assessment they were residents of the county of Idaho, and that the property assessed was situated in the same county. This seems to be conceded in the argument, and the only question thus presented is, whether the assessment of the tax in Ada county was valid.

There can be no question that an assessment of taxes to

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be valid, must be made within the jurisdictional limits of the taxing power, and by the proper officer of the district or county where the taxes are levied. What the districts and proper officers are, must depend upon the statute under which the assessments are made, and to that alone must we look for a solution of the question, and hence the various authorities cited on both sides can have but little or no application to it.

In the creation of the counties of this territory, it was difficult for the legislature to define with any degree of certainty their boundaries. This was owing to the unsettled condition of the country, a want of knowledge of the sources of streams, and the exact situation of mountains and other natural objects, by which such boundaries could, with any degree of certainty, be established. Added to this, it was impossible, without actual surveys, to establish the boundaries so as to enable the public authorities to determine where they were to be found, and thus to fix the limits of the territorial jurisdiction of the several counties beyond question or doubt. Even the actual settler might claim, honestly enough, to be a resident and taxpayer in one county, when in fact he might be living in another, and in this way deny the authority of the proper county to tax him. Under such circumstances, it was easy to see that great difficulties might arise in collecting the public revenues, and in carrying on the financial operations of the government.

To obviate these difficulties the legislature passed the act under which the assessments in question were made, and though somewhat obscure and wanting in direct terms to express the intention of the legislature, yet by necessary implication there can be no difficulty in apprehending its true meaning, and in applying its provisions to the case under consideration. By sections 36, 37, and 38 of the revenue act, 5 Sess. Laws, provision is made for collecting delinquent taxes by suit in the county where the assessment is made, and direction is given as to the form of the complaint, and by section 39, the character of the defense is prescribed against a suit thus instituted. This defense is

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as follows, viz: First, that the taxes have been paid before suit. Second, that the taxes with costs have been paid since suit, or that such property is exempt from taxation under the provisions of section 4 of the act. Third, all claim, title, or interest in the property assessed, at the time of the assessment. Fourth, that the land is situated in and has been duly assessed in another county, and the taxes thereon paid. Fifth, fraud in the assessment or fraud in failing to comply with the provisions of the act, by which fraud the party or property assessed has suffered injury.

The respondents in their answer have set up neither of these defenses, and we might well let the judgment stand for want of a sufficient answer under the statutes.

The counsel for the respondents, however, have argued with much earnestness that, notwithstanding the provisions of the act prescribing the grounds of defense, they are at liberty to set up any other defense which they might be permitted to do, had no such defense been prescribed, but I am unable to coincide with them in this view of the law. The power of taxation for public purposes is inherent in every government, without it no government can exist, and its exercise in any mode prescribed by law can not be questioned. It may provide summarily for the assessment and collection of taxes, or by suit at law in which the taxpayer may be allowed to assert his right to exemption from the burden sought to be imposed upon him, and it may also determine upon what grounds such right may be asserted. So too it may define by law the taxing district, and appoint officers for the assessment and collection of the public revenues.

This is a prerogative right, and must therefore necessarily be an exclusive and peculiar privilege with which no one can interfere; of course there are limitations to this authority, founded upon principles of natural justice, or imposed by some fundamental law, to which all legislative power is subservient, but within such limitations it is supreme. In entering into the social compact every citizen surrenders to the sovereign authority the control of so much of his property as is needed for the public good, and the

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exercise of this authority within proper limits can not be called in question by those who are subject to it.

It is urged by the respondents' counsel that it is not competent for the legislature to extend two taxing districts over the same territory, and by so doing subject the citizen to double or unequal taxation. This is conceded, for it is a principle of natural justice underlying our whole government, that the public burden shall not be distributed unequally, but borne by all in just proportions; but has it done so? It is difficult for us to see that it has. The revenue law contemplates that two counties may claim jurisdiction over the taxable property of persons living in doubtful or disputed territory, but there is no provision in it that will by any fair construction subject the property thus situated, to double or unequal taxation. If assessments are made in both counties, it is competent for the taxpayer to pay his taxes in either, as may best suit his interests or convenience, provided he can show that his land lies in the county where he has paid his taxes and has been duly assessed thereon; and in this view, the taxing district under the law, is that wherein the taxes have been duly levied and paid.

This seems to be the proper construction of the revenue act, for under it the taxpayer can not complain of inequality or injustice, nor can he render any attempt on the part of the public authorities to collect the public revenue in such disputed territory difficult or abortive. The legislature has been particularly careful of the rights of the citizen in this respect, for it has gone so far as to authorize him, when a suit has proceeded to judgment and such judgment remains wholly unsatisfied, to have it re-opened for the purpose of setting up the defense allowed by the fourth subdivision of section 39, and to avail himself as fully as he may, by due course of pleading in suits thereafter commenced.

I am, therefore, of the opinion that the assessment of the taxes in Ada county was strictly legal, and that the defense interposed was not sufficient to bar the action.

Section 37, of the revenue law, under which the suit was brought, provides, among other things, that the complaint

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shall state the name of the owner of the real estate and personal property, and that, upon such property, there has been duly levied a territorial tax of ——— dollars, and a county tax of ——— dollars, amounting in the whole to ——— dollars, all of which is due and unpaid, of which amount ——— dollars was duly assessed and levied against the real estate, and ——— dollars against the improvements; wherefore said plaintiffs pray judgment against the party for the sum of ——— dollars (the whole of said tax), and separate judgment against the real estate, and improvements for the sum of ——— dollars (the tax thereon), etc.

The prayer of the complaint did not conform to this requirement, but asks, instead, for a judgment for the whole amount against the defendants, and for the same amount against the real estate and improvements, and the judgment followed the complaint in this respect.

The cause will be remanded, with directions to the district court to grant leave to the plaintiffs to amend the complaint, and to the defendants to answer it as amended and to proceed in all respects in conformity to this opinion. The respondents will be required to pay the costs of this court, and judgment to that effect will be entered accordingly.

JORDAN W. HYDE, RESPONDENT, v. H. O. HARKNESS,
APPELLANT.

PRACTICE—MOTION FOR A NEW TRIAL—APPEAL.—An appeal from an order granting or refusing a new trial must be taken within thirty days from the time the order is made and filed with the clerk.

IDEM—STATEMENT.—A statement on a motion for a new trial can only become a part of the record by the certificate of the judge, or referee who tried the case.

APPEAL from the third judicial district, Oneida county.

L. P. Higbee and J. R. McBride, for the appellant.

Huston & Gray and F. E. Ensign, for the respondent.

CLARK, J., delivered the opinion. HOLLISTER, C. J., concurred.

The appeal is from an order denying appellant's motion for a new trial, and from the final judgment in the action.

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It is claimed by the respondent that the appeal from the order denying a new trial was not taken within the time prescribed by statute; that the court, therefore, has no jurisdiction of said appeal, and that it must be dismissed. Respondent also claims that the statement used on motion for a new trial must be stricken out on the ground that the same is not certified by the judge, therefore can not be used on motion for a new trial or on appeal from the final judgment. Respondent further claims that the undertaking filed on appeal from the order denying a new trial, is insufficient, and does not comply with the requirements of the statute. Judgment was entered on the twenty-eighth day of July, 1875. On the tenth day of August, 1875, another judgment was entered herein in lieu of the first judgment modifying the same. On the tenth day of August, 1875, an order was made overruling the appellant's motion, in the court below, for a new trial. On the thirtieth day of September, 1875, the appellant filed his notice of appeal to this court from said judgments, and the order overruling his motion for a new trial.

Section 437, of the civil practice act, provides as follows, to wit: "An appeal may be taken from an order granting or refusing a new trial within thirty days after the order is made and filed with the clerk." The appeal was not made in time, but twenty-one days after the time limited by statute had expired.

The transcript shows that the statement used on motion for a new trial was filed on the tenth day of August, 1875, and that it had been agreed to by counsel for the respective parties, as appears by their certificate thereto attached. The third subdivision of section 211 of the civil practice act, among other things provides as follows, to wit: "It is the duty of the judge or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant and useless matter, or to any inaccurate statement. When settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk." The statement has not

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been certified by the judge who heard the cause, in the manner above provided, or at all, and hence ought to have been disregarded on the hearing of the motion for a new trial. The statute contemplates that a statement can only become a part of the record by the certificate of the judge or referee.

Section 448 of the civil practice act provides that any statement used on motion for a new trial may be used on appeal from a final judgment, equally as on appeal from the order granting or refusing a new trial. The statement ought not to have been heard or used on the hearing of the motion for a new trial, by reason of the objections thereto above stated, and as the same still exist, it can not be used on the appeal from the final judgment.

It appears from the order denying the motion for a new trial, that the court made the following order, to wit: "That the defendant" (now appellant) "shall have until the first day of October next to appeal from the judgment so modified, and also from the order overruling the motion for a new trial." The court can not extend the time provided by statute within which to appeal from an order granting or refusing a new trial. An appeal from an order in such case must be taken within thirty days from the time the order was made, hence the order above cited was error and of no effect.

The appeal from the order overruling the motion for a new trial is dismissed and the statement used on the motion for a new trial stricken from the record in this action.

ON PETITION FOR REHEARING.

We have examined this petition and considered the grounds therein stated and the authorities cited by the counsel for petitioner, but fail to discover any good reason why we should depart from the doctrine laid down by this court in the opinion now on file in this action, on motion to dismiss the appeal from the order overruling the motion for a new trial, and to strike out statement used on the hearing of the motion for a new trial.

The rehearing is denied.

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DAVID ANDERSON ET AL., RESPONDENTS, v. W. B.
KNOTT, APPELLANT.

PRACTICE—APPEAL—NOTICE OF APPEAL—SERVICE—JURISDICTION.—In order to give this court jurisdiction of a case, on an appeal, it is necessary that the transcript should show that the notice of appeal has been served on the adverse party. Unless the record shows such service the appeal will be dismissed.

APPEAL—REGULARITY OF PROCEEDINGS MUST APPEAR—PRESUMPTIONS.—The regularity of the proceedings by which an appeal is taken must be shown affirmatively. Nothing will be presumed in favor of the same.

UNDERTAKING ON APPEAL.—The undertaking on an appeal must be filed within five days after the service of the notice of appeal, unless a deposit of money be made instead, or the undertaking be waived by the adverse party, in writing.

APPEAL from the second judicial district, Owyhee county.
Motion to dismiss the appeal.

R. Z. Johnson and H. E. Prickett, for the motion.

Brumback & Cahalan, contra.

CLARK, J., delivered the opinion. HOLLISTER, C. J., concurred.

In this case the respondents move to dismiss the appeal, on the ground that no undertaking was filed within five days after service of the notice of appeal. The notice of appeal was filed on the thirty-first day of July, 1875. On the first day of September, 1875, the undertaking for appeal was filed. The notice of appeal does not show that it had been served upon the respondents or their attorneys, or either of them.

The transcript in this case does not show that the notice of appeal had been served upon any person or persons whatever, hence we conclude that service of the same had not been made. The party moving for an appeal must show affirmatively that he has complied with the law relative to appeals in order to give this court jurisdiction. Nothing can be presumed or inferred in his favor. Section 438 of the civil practice act reads as follows, to wit: "The appeal shall be made by filing with the clerk of the court, with whom the judgment or order appealed from is entered, a

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notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose, unless, within five days after service of the notice of appeal, an undertaking be filed or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing."

In this case there is no proof of the service of the notice of appeal, and the same being absolutely necessary to an appeal, this appeal is dismissed.

JOHN GORMAN, RESPONDENT, v. THE BOARD OF COMMISSIONERS OF BOISE COUNTY ET AL., APPELLANTS.

APPEALS FROM ORDERS OF COUNTY COMMISSIONERS—JUDGMENT ON.—On an appeal to a district court from an order of a board of county commissioners, rejecting a claim against a county, a money judgment can not be rendered, either against the board or the county. The order must be affirmed, or reversed and directions given to the board to allow it, or annulled, or modified and sent back with directions to pass upon it as modified.

PARTY—COUNTY.—A county can not be made a party in an appeal from an order of the board of commissioners. It can only be proceeded against by an action under the provisions of the statute which authorizes suits against a county.

APPEAL from the district court of the second judicial district, Boise county.

Jonas W. Brown and H. E. Prickett, for the appellants.

George Ainslie, Smith & Kelly, and Huston & Gray, for the respondent.

HOLLISTER, C. J., delivered the opinion. CLARK, J., concurred.

This case comes here by appeal from a judgment rendered by the district court of Boise county against the board of county commissioners of said county and the county of Boise, at the March term thereof for the year 1875.

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It appears from the transcript, that the respondent presented to the board of commissioners at its April term, 1874, the following account, to wit:

Boise county in account with John Gorman, assessor and collector. 1874.

Amount of property tax collected during the year 1873.....	\$27,409 78
Total \$4 polls, collected during the year 1873..	5,624 00
Amount \$5 polls.....	1,785 00
Amount hospital tax.....	3,642 00

Total amount revenue collected.....	\$38,460 78
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DR.

To assessor and tax collector, per cent. on property tax (10 per cent).....	\$2,740 93
On territorial and county poll tax.....	1,481 80
On hospital tax	728 40
	<u>\$4,951 13</u>

Apportioned as follows:

On property tax, county proportion.....	\$2,055 70
On property tax, territory proportion.....	685 23
On poll tax, territory proportion.....	740 90
On poll tax, county proportion.....	740 90
On hospital tax, by county.....	728 40
	<u>\$4,951 13</u>

RECAPITULATION.

Assessor and tax collector, per cent. due from county, payable on current expense and redemption fund, as follows:

Per cent. on property tax.....	\$2,055 70
Per cent. on poll tax.....	740 90
Per cent. on hospital tax.....	728 40

Total on current expense and redemption fund...	\$3,525 00
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Per cent. due and payable out of territorial money in county treasury, as follows:

On property tax.....	\$685 23
On poll tax.....	740 90
Total amount of territory moneys.....	<u>\$1,426 13</u>

Total due as per cent.....	\$4,951 13
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This account was verified by the affidavit of the respondent, and after consideration was rejected by the board on the seventh day of April, 1874, by an order duly entered of record, from which order the respondent took an appeal to the district court of said county.

Several questions have been stated and very ably argued on both sides, but as they are not presented in a shape that demands our attention, we shall only consider the question, whether a money judgment can be entered in the district court, on an appeal from an order of the board of commissioners refusing to audit an account against the county. As this must be determined by the statute, a simple reference to so much of it as gives an appeal from such an order is all that is deemed necessary to settle it. After giving an appeal from any order of the board of county commissioners in section 17 of the act creating a board of county commissioners in the counties of the territory, approved January 15, 1869 (5 Sess. Laws, 107), it is provided in section 19, that "on appeal the case shall be heard anew, and the court may affirm, reverse, annul, or modify the order or decision appealed from," etc.

In this case the district court did neither. Instead of proceeding on the appeal in accordance with the above provision of the statute, it entered a judgment to the full amount of the claim of the respondent against not only the board of commissioners, but also conjointly with the board, against the county itself. We think the court should either have affirmed the order, or reversed it, with directions to the board to allow the account, or annulled it, or modified it, and sent the order thus modified back to the board with directions to pass upon it as modified. The only way a county can be made a party defendant is by suit, in the same way as against an individual, as prescribed by section 1 of an act entitled "an act permitting counties to sue and be sued," approved January 10, 1871 (6 Sess. Laws, 76). It follows, therefore, that the county of Boise was improperly joined with the board, and that no judgment could be entered against it in this proceeding.

Opinion of the Court—Hollister, C. J.

The judgment of the district court will be reversed, the case remanded, and a new trial ordered, and the respondent directed to pay the costs of this court.

Reversed, and new trial ordered.

C. W. MOORE, RESPONDENT, v. J. B. TAYLOR,
APPELLANT.

JUDGMENTS—POWER OF COURT OVER DURING TERM.—Courts have full power during the term to alter, revise, revoke, annul, or amend their judgments and all other proceedings, and the rights of parties can not be considered as fully settled, until the judgments pass beyond the control of the court.

CONSTRUCTION OF JUDGMENTS.—In passing upon the meaning and effect of their judgments, courts sometimes look behind them to see upon what they are founded, and the intention of courts is to be deduced from every part of the judgment and the proceedings leading thereto; and when the intention is accurately ascertained, it will always prevail over mere words. Hence, although the word “reversed” is used in a judgment of this court, yet if it can be ascertained from its whole scope that it was only the intention to modify, and not vacate the judgment of the court below, it will be considered as an affirmance of such judgment, as modified.

APPEAL from the district court of the second judicial district, Ada county.

Smith & Kelly and J. W. Huston, for the appellant.

H. E. Prickett and Brumbuck & Cahalan, for the respondent.

HOLLISTER, C. J., delivered the opinion. CLARK, J., concurred.

The facts of the case so far as they have any important bearing upon the question under consideration, are as follows: On the eighth day of January, 1872, one O. W. Peterson and wife, who were then the owners of the property, executed to James Griffin a mortgage upon the undivided one half of lots 5, 6, and 10 in block 2, in Boise city, and certain personal property, to secure the payment of a promissory note given by Peterson to Griffin for the sum of three thousand dollars in gold. Upon default of

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the payment of the note according to its terms, a suit was commenced in the district court of Ada county against the mortgagors by Griffin, in which the appellant as a subsequent incumbrancer was also made a party defendant, upon the hearing of which a decree was entered by said court on the twelfth day of April, 1873, that the property described in the mortgage, or so much thereof as should be sufficient to raise the amount due to Griffin for principal, interest, counsel fees, and costs, be sold by the sheriff of Ada county.

It further appears that in pursuance of such decree the sheriff offered the property for sale at public auction on the thirty-first day of May, 1873, that the appellant bid for the undivided half of lots 5 and 6 in block 2, the sum of two thousand seven hundred and twenty-five dollars in gold coin, and for the undivided half of lot 10, the sum of one hundred dollars in gold coin, and for the personal property, the sum of seven hundred dollars in gold coin, making in the aggregate the sum of three thousand five hundred and twenty-five dollars, for which sum the whole of said property was struck off to him, and that on the same day, the sheriff executed to him a deed for the real estate so sold. It also appears that the appellant obtained a judgment in the Boise county district court against the said O. W. Peterson on the third day of August, 1872, for the sum of six thousand three hundred and twenty-three dollars and ninety cents, and on the fifth day of the same month, filed a transcript thereof in the recorder's office of Ada county, and that the same was recorded in the books of the office, but by a mistake of the recorder the judgment was recorded as against D. W. Peterson instead of O. W. Peterson.

From this judgment Peterson took an appeal to this court, and on the hearing, by an order of this court made and entered on the fifteenth day of February, 1873, the same was reversed. On petition by the appellant for a rehearing the case was heard again, and on the twenty-sixth day of February, and during the same term, the judgment of the district court was modified so as to reduce the amount of the judgment in the district court some eight hundred dollars.

Immediately on the rendering of the judgment of the

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court on the fifteenth day of February, 1873, to wit, on the same day, Peterson and wife executed to the respondent a mortgage upon the real estate in question to secure the payment of a promissory note of the same date, executed by Peterson to respondent, for the sum of one thousand seven hundred and fourteen dollars and sixty-eight cents in gold coin, payable in six months after the date thereof. The record shows that Peterson was in default in the payment of the note, and that on the twenty-ninth day of October, 1873, respondent filed his complaint in the district court of Ada county against appellant for the foreclosure of his mortgage and the redemption of the real estate mentioned, from the sale to appellant under the Griffin mortgage.

To this complaint an answer was put in alleging, among other things, that if the respondent is entitled to redeem the premises from the appellant, it is only on condition that he pay not only the amount for which the same were sold to him, but in addition the full amount of his judgment against the said Peterson, as modified by the judgment of the supreme court entered on the twenty-sixth day of February, 1873; the same being a prior lien upon the same, as he alleged.

On the fourteenth day of February, 1874, the court entered a decree that the judgment of appellant against Peterson created a lien upon the real estate, subsequent or junior to the mortgage incumbrance of the respondent, and that the respondent should be entitled to redeem from the sale under the Griffin mortgage, by the payment to appellant of the sum for which the premises were sold to him, with interest, etc.

There are several errors assigned by the appellant as grounds on which he claims a reversal of the decree of the district court; but, in the view we take of the case, it is only necessary to notice but one, and that is, whether the decree declaring the mortgage of respondent prior in point of time and superior in equity as a lien to that of the judgment of the appellant, was erroneous or not.

There are two reasons urged by the counsel for the respondent in support of the decree, which it is deemed im-

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portant to consider, as upon their validity the case must turn. They are as follows: 1. That the recording of the transcript of the judgment obtained by the respondent against Peterson, in the Boise county district court, in the recorder's office of Ada county, as against D. W. Peterson instead of O. W. Peterson, did not create a lien upon the real estate in question. 2. That the judgments of the supreme court of the fifteenth and twenty-sixth of February, referred to, had the effect to let in the mortgage of respondent as a prior incumbrance upon the property.

In disposing of the first point, it is only necessary to consider the statute upon the subject, and its application to this branch of the case. After prescribing, in sections 207 and 208 of the civil practice act of the second session, the mode in which docket entries of judgment shall be made, it is provided, in section 210, "that a transcript of the original docket, certified by the clerk, may be filed with the recorder of any other county, and from the time of filing, the judgment shall become a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for two years, unless the judgment be previously satisfied." It will be seen from this provision that it is not necessary, in order to create a lien upon the real estate of the judgment debtor, that the certified transcript of the original docket should be recorded; and hence, whether it be recorded or not, it can not affect the lien one way or another. If the proper transcript be filed with the recorder, it is sufficient to make the lien good for the time prescribed in the statute.

The proof in this case shows that the proper transcript was filed with the recorder, but in transcribing it upon the records of the office he made the clerical mistake in the initial letter of the Christian name of the judgment debtor. As the lien was created by the filing of the transcript with the recorder, any error of his in recording it could not have the effect contended for by appellant's counsel. The other reason, that the two judgments of this court on the fifteenth

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and twenty-sixth days of February, 1873, had the effect to postpone appellant's judgment lien upon the property in question, so as to give priority to respondent's mortgage, has received our most careful consideration, and though the arguments in support of it have been able and exhaustive, yet we have been unable to yield our assent to the reasons urged, or to uphold the decree of the district court in favor of the respondent.

Upon the first hearing of the appeal in the case of *Peterson v. Taylor*, a majority of the court were of the opinion that the judgment of the district court should be reversed, and that the cause should be remanded for a new trial. This decision was rendered on the fifteenth of February, but on petition of Taylor a rehearing was ordered on the twenty-first day of the same month, a part of which order is as follows: "And until a rehearing and decision are had upon the question, that all further proceedings in the case be stayed," and on the twenty-sixth day, the record entry of the proceedings of the court was made as follows:

"Now on this day the decision of the court was announced thereon, that the order heretofore entered in this case, reversing the judgment and remanding the case to the court below, be vacated, and that the respondent J. B. Taylor have judgment herein for five thousand and thirty-eight dollars and sixteen cents, together with interest on that sum from the date of the judgment of the district court, to wit, the third day of August, 1872, making in the aggregate the sum of five thousand three hundred and twenty-two dollars and fourteen cents.

"Whereupon it is now considered, ordered, adjudged, and decreed by the court here, that the order and judgment heretofore entered in this case, reversing the judgment and remanding the case to the court below, be, and the same is, hereby vacated and set aside. It is further ordered, adjudged, and decreed that the judgment of the court below be, and the same is, hereby reversed, and that the said J. B. Taylor, respondent, do have judgment against O. W. Peterson, appellant, for the sum of five thousand three hundred and twenty-two dollars and fourteen cents. It is

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further ordered and adjudged that the order refusing a new trial be, and the same is, hereby affirmed, and that the respondent J. B. Taylor do pay the costs of this proceeding."

The doctrine, that during the term of a court "the proceedings remain in the breast of the judges, and that not only the records during that time are subject to the revision of the court, but the judgment itself may be altered, revised, revoked, as well as amended, in respect to clerical errors and matters of form," has not been disputed, nor can it well be, for it has been acted upon by the courts of England and of this country since the time of Lord Coke, and it is so well settled as to become a rule of action in both countries, which can not now be overturned. Proceedings during the term are considered only *in fieri*, and subject to the control of the courts, and no rights can be considered as fully settled and determined until they pass beyond the control of the court by the adjournment of the term. It follows, therefore, that Taylor did not lose the benefit of his judgment against Peterson in the court below, nor of his lien under it, by the order of reversal entered on the fifteenth of February. Until the final adjudication of the case his rights under the judgment were only suspended, not destroyed, and hence, his lien could not be cut out or superseded by the mortgage given by Peterson to the appellant. In taking the mortgage the respondent took it with full notice of Taylor's rights under this principle of law and in subordination thereto. He was not, in contemplation of law, a *bona fide* prior incumbrancer, so far as Taylor's rights were concerned.

In considering the effect of the judgment of this court on the twenty-sixth of February upon the question before us, our attention has been directed to the principle that courts, in construing the meaning and effect of their judgments, are governed by the same general principles as in the construction of statutes. It is said in Freeman on Judgments, p. 180, sec. 215, that "courts, in order to give a proper and just effect to a judgment, sometimes look behind to see upon what it is founded, just as they would, in construing a statute, seek to ascertain the occasion and purpose of its enactment." This principle, thus enunciated as a rule

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of interpretation, has reference primarily to judgments founded upon causes of action in courts of original jurisdiction; still, in our view, it is equally applicable to judgments entered in appellate courts, and serves to interpret their meaning and to give them effect, the same as in other courts.

The same principle is applicable in the exposition of wills. Sir William Blackstone, in his Commentaries, book 1, page 59, observes, "that the fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time the law was made, by signs the most natural and probable, and these signs are either the words, the context, the subject-matter, the effects and consequences, or the spirit and reason of the law." The learned Chancellor Kent, in volume 1, marginal page 462, of his Commentaries, says: "It is an established rule in the exposition of statutes, that the intention of the law-giver is to be deduced from a view of the whole, and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms. To know the laws, is not to observe their mere words, but their force and power, and the reason and intention of the law-giver will control the strict letter of the law, when the latter will lead to palpable injustice, contradiction, and absurdity." These are maxims of sound interpretation, as the writer observes; and guided by them as rules by which we are to determine the proper meaning of the judgment referred to, we have had but little difficulty at coming to our conclusions.

The judgment of the court below, as has been shown, was at first reversed, and the cause remanded for further proceedings. On a rehearing another judgment was rendered, technically, but not by any proper understanding of the true intention of the court, reversed so as in effect to vacate or annul the judgment below. To give it such effect would be simply to do what had already been done in the first instance, and to remit the parties to the right to have their matters litigated anew in the district court, subject to such directions as this court might give as to further proceedings.

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This was not the intention of the court as gathered from the whole proceedings in granting a rehearing, and in entering up the judgment as was done. To this may be added the fact that I delivered the opinion of the court, upon which the judgment was based, and had the fullest opportunity of knowing what was its purpose and object in the whole proceeding, and that in no sense was the term “reversed” used to overturn or vacate the judgment of the district court. Inasmuch as a majority of the court was of the opinion that the court below erred in allowing interest upon the unsettled accounts of the parties, it was thought necessary, to a modification of the judgment, that it should be reversed, in order to an affirmance of so much of it as was not erroneous. That this was the view of the court, it is important to look at so much of the decision as affirms the order of the district court, in overruling Peterson’s motion for a new trial. Had the intention of the court been to vacate and set aside the judgment of the district court, it would have found it necessary to reverse the order overruling the motion for a new trial, and to have remitted the whole case to the district court for a new trial.

In this view of the question, the only proper effect which is to be given to the word “reversed” is, that so much of the judgment of the court below as allowed interest, was reversed, and, as to the remainder, it was affirmed; any other exposition of its meaning would be unjust to the appellant, inasmuch as it would be to deprive him of those rights which it is the policy of the law to settle by a speedy and final adjudication in a court having competent authority over the whole subject-matter, when at the same time no benefit could possibly accrue to the other party by any further litigation or delay.

The inquiry in this connection may well be made, Of what use could another trial below be to either party? In sending the case back to the district court for a new trial, it would be with directions only to render such judgment as it was competent for this court to render, thus entailing costs and delays to the parties unnecessarily. This would be an absurdity upon the face of it, and the rule that where the ex-

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position of a judgment leads to such a conclusion, it is to be rejected, may well be invoked. We think the lien of the appellant, created by the judgment of the district court of Boise county, against Peterson, as modified by this court in its judgment of the twenty-sixth of February, 1873, was not subordinated to the mortgage lien of the respondent, but that it continued in full force as a prior incumbrance, up to the time when appellant purchased the property under the Griffin sale, and that before the respondent can divest him of the rights thus created, he must be required not only to reimburse the amount paid for the real estate in question on such sale, but also the amount of his judgment, with interest, after deducting the value of the rents, issues, and profits, while he has had the use and occupation of the real estate.

It is the opinion of the court, that the decree of the district court be reversed, and the cause remanded with directions to said court to proceed to a final adjudication thereof, in conformity to this opinion.

It is further ordered, that the appellant pay one half of the costs of this court, and the respondent one half thereof.

JORDAN W. HYDE, RESPONDENT, v. H. O. HARKNESS,
APPELLANT.

APPEAL—STATEMENT—BILL OF EXCEPTIONS—PRACTICE.—Where there is no statement of the case or bill of exceptions, and the pleadings warrant the verdict and judgment, this court can not disturb the judgment; but must affirm the same.

APPEAL from the third judicial district, Oneida county.

L. P. Higbee and John R. McBride, for the appellant.

F. E. Ensign and Huston & Gray, for the respondent.

CLARK, J., delivered the opinion. HOLLISTER, C. J., concurred.

This is an action for malicious prosecution, commenced in the district court of the third judicial district in and for

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Oneida county, on the twenty-fourth day of September, 1873. The cause was tried in said court at the July term thereof, 1875, by the court sitting with a jury. On the twenty-second day of July, 1875, the jury returned their verdict in favor of the plaintiff, now respondent, and for three thousand five hundred dollars damages. Judgment was entered for the said sum and costs. The defendant, now appellant, moved for a new trial, and on the tenth day of August the motion came on to be heard before the judge at chambers, in Malad city, in said Oneida county.

The motion was to vacate the judgment and for a new trial. After hearing the motion, the court ordered as follows, to wit: "Ordered, that a new trial be allowed in this action, with costs, to abide the event of the suit, unless within five days from this date the plaintiff, now respondent, shall release and discharge the sum of one thousand dollars, part of said judgment, in which case the motion to vacate the judgment and for a new trial be and the same is ordered overruled; and the judgment heretofore entered herein be modified, so that the damages to be recovered by plaintiff from the defendant shall be for the sum of two thousand five hundred dollars, besides the costs of suit."

On the twelfth day of August, 1875, the plaintiff, now respondent, by his attorneys, in writing, released and discharged the sum of one thousand dollars, a part of the said judgment, in accordance with the order of the court herein set forth; by reason of this release and discharge, and the order of the court aforesaid, the motion to vacate the judgment and for a new trial was overruled. On the thirtieth day of September, 1875, the defendant filed his notice of appeal to this court, from the judgment and order overruling his motion for a new trial.

On the twentieth day of January, 1876, this cause came on to be heard on respondent's motions to dismiss the appeal from the order refusing a new trial, and to strike out the statement from the transcript in this action. This court, after considering the motions, dismissed the appeal from the order denying a new trial, and ordered that the statement used on the motion for new trial be stricken from the tran-

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script in this case. By reference to the opinion of this court on the motion to dismiss the appeal from the order denying a new trial, and to strike out the statement, it will appear that the appeal was not taken within the time prescribed by statute, and that the statement of the case used on the motion for new trial was not certified and allowed so as to entitle it to become a part of the record in this action. (Sec. 437 Revised Laws of this territory, third subdivision of Sec. 211 Revised Laws.)

The statement of the case being stricken from the record, and there being no bill of exceptions, there is nothing for this court to review, save the pleadings and order of the court discharging a part of the judgment first entered herein, and the judgment; and as there appears no error in the pleadings, verdict, order, or judgment,

The judgment for two thousand five hundred dollars, and costs of suit, must be affirmed, and the same is affirmed accordingly, with costs in this court, in favor of the respondents.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT,
JANUARY TERM, 1877.

PRESENT:
HON. M. E. HOLLISTER, CHIEF JUSTICE.
HON. JOHN CLARK, } JUSTICES.
HON. H. E. PRICKETT, }

GEORGE AINSLIE, RESPONDENT, *v.* THE IDAHO
WORLD PRINTING CO., APPELLANT.

REVIEWING VERDICT ON APPEAL FROM JUDGMENT—PRACTICE.—Upon an appeal from a judgment the court may review the verdict of the jury, if excepted to, and the evidence upon which such verdict is based. An exception to the verdict, on the ground that it is not supported by the evidence, can not be reviewed on an appeal from the judgment, however, unless the appeal is taken within sixty days after the rendition of the judgment.

CONFLICT OF TESTIMONY.—When this court find upon a review that there is a substantial conflict of testimony, it will not disturb the decision of the court below refusing a new trial. If the testimony consist wholly of depositions, the rule is different, but not when a considerable portion was oral.

APPEAL from the second judicial district, Boise county.

J. W. Brown and Huston & Gray, for the appellant.

Alanson Smith and J. Brumback, for the respondent.

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PRICKETT, J., delivered the opinion. HOLLISTER, C. J., and CLARK, J., concurred.

This action is upon a balance of account for services rendered by the respondent as editor of the *Idaho World*. The defendant answered, setting up an express contract, and alleging full payment thereunder. The issues were tried by a jury, and the plaintiff obtained a verdict for nine hundred dollars, upon which judgment was rendered September 30, 1876. The defendant immediately moved for a new trial upon the minutes of the court, which motion was denied. A statement was thereafter settled and authenticated pursuant to the statute, and on the fourth day of October, 1876, an appeal from the judgment was taken to this court. The record brought to this court upon the appeal consists of the judgment-roll, the proceedings and statement on motion for a new trial, and the notice and undertaking of appeal. The error assigned is that the evidence is insufficient to justify the verdict.

The respondent insists that the facts can not be reviewed in this court upon an appeal from the judgment, and that the statement settled after motion for a new trial can only be used for the purpose of showing errors of law committed in the court below, excepted to at the trial. This proposition would have been correct under the statute prior to the revised code, but the new code has changed the rule in this respect. Section 454 provided that "upon an appeal from a judgment, the court may review the verdict or decision if excepted to, or any intermediate order if excepted to which involves the merits or necessarily affects the judgment." The first subdivision of section 437 provides that "an appeal may be taken first from a final judgment in an action or proceeding commenced in the court in which the judgment is rendered within one year after the entry of judgment. But an exception to the decision or verdict on the ground that it is not supported by the evidence, can not be reviewed on appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment."

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Section 448 provides what shall constitute the record on appeal from a final judgment, viz.: "A copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies. Any statement used on motion for a new trial, or settled after decision of such motion, when the motion is made on the minutes of the court, etc., may be used on appeal from a final judgment, equally as upon appeal from the order granting or refusing a new trial."

Section 201 of the new practice act provides that the verdict of the jury is to be deemed excepted to. These several provisions of the statute, examined by their own light, seem to us too clear to admit of any doubt as to their meaning. They are in harmony with each other, and were evidently intended to do away with the necessity of taking two appeals in the same case, in order that the facts and the law might be reviewed. Under these statutes the verdict of the jury, if excepted to, may be reviewed on an appeal from a judgment, but if the exception to the verdict is on the ground that it is not supported by the evidence, then, in order to have the same reviewed, such appeal must be taken within sixty days after the rendition of the judgment. And upon such review the statement used upon or settled after motion for new trial, in accordance with the statute, may be used, if it could be used on an appeal from an order granting or refusing a motion for a new trial, as fully and to the same extent and for all the purposes that it could be used on such last-named appeal. The verdict is "deemed excepted to," which means that the exception is saved, and when properly incorporated in a statement or bill of exceptions, with a statement of the grounds upon which it is based, it is available as an exception.

But it is a well-established rule that when the appellate court finds, upon a review of the testimony, that there is a substantial conflict, it will not disturb the verdict or the decision of the court below granting or refusing a new trial. Upon an examination and review of the testimony in this case we find that it is fully within that rule, scarcely any two witnesses agreeing as to the material facts in the case.

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But it is claimed by the appellants that this case should be excepted from the operation of the rule, because much of the testimony is in writing, and consists of depositions. This position would be correct if all the material testimony was in writing, for in that case this court would have the same means for determining the weight of the evidence as the jury had, but in this case much of the material testimony was given orally in court. It is not, therefore, excepted from the general rule above stated, and we are not called upon to grant a new trial.

The judgment of the district court must be affirmed, and it is accordingly hereby affirmed with costs to the respondent.

**J. H. BOWMAN, RESPONDENT, v. GEORGE AINSLIE
AND JOHN WEST, APPELLANTS.**

PLEADING—AGREEMENT—PRESUMPTIONS.—Unless an agreement appears from the complaint to have been verbal, the court will presume that it was in writing, where the nature of the agreement is such that it could not be valid unless in writing.

AGREEMENT.—An agreement by A., who has assets in his hands belonging to B., to apply the same for the benefit of C., who is a creditor of B., is not valid, and can not be enforced by C. against A., unless B. has authorized or consented to such application of such assets.

APPEAL from the second judicial district, Boise county.

Alanson Smith, for the appellant.

Jonas W. Brown, for the respondent.

PRICKETT, J., delivered the opinion. HOLLISTER, C. J., and CLARK, J., concurred.

Action upon a promissory note made by the appellant to the respondent. The answer expressly admits the execution of the note, but avers that at the time of its execution and delivery it was agreed between the maker, Ainslie, and Bowman, the payee, "that the *Idaho World* printing company, a corporation, was indebted to the appellant, Ainslie, in a sum exceeding that mentioned in the promissory note; that the said Bowman, who had previously disposed of stock

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and shares in said corporation, had reserved the outstanding accounts and bills due said corporation at the time of such sale, amounting to a large sum; that out of collections to be made upon such accounts, said Bowman was to retain the amount of said note and interest and pay off the same." It is further alleged that Bowman did subsequently collect on said accounts more than sufficient to discharge said note.

To this answer the plaintiff and respondent interposed a general demurrer on the ground that it did not contain facts sufficient to constitute a defense. The court sustained the demurrer and rendered judgment on the complaint. The appellant excepted to the ruling of the court below, and appeals from the judgment so rendered.

The question to be determined here is whether the district court erred in sustaining the demurrer to the answer. The appellants claim that the facts stated in the answer are equivalent to a plea of payment; that they do in fact allege payment and satisfaction of the note sued upon; while the respondent claims, in support of the decision of the district court upon the demurrer:

1. That the agreement alleged in the answer was a promise by Bowman to answer for the debt of the Idaho *World* Printing Company to Ainslie, which, not being alleged to have been made in writing, appears, from the face of the answer, to be void under the statute of frauds; and

2. That the agreement alleged is not valid between Bowman and the maker of the note, and not binding upon Bowman, because the Idaho *World* Printing Company, whose funds were to be disposed of under the agreement, did not authorize, sanction, or consent to such disposition.

The first position assumed by the respondent is not tenable, for even if the answer could be regarded as alleging a promise on the part of Bowman to pay the debt of the Idaho *World* Printing Company to Ainslie, it is not alleged, nor does it appear upon the face of the answer, that such contract or agreement was verbal; and it is the well-settled law, that the statute of frauds does not change the rules of pleading. Unless the agreement appears, from the com-

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plaint or pleading, to have been verbal, the court will presume that it was in writing, when the nature of the agreement is such that it could not be valid unless in writing; but when the party alleging the agreement comes to the proof of his allegations, he must show such an agreement as is valid under the statute of frauds.

But the answer, as we construe it, sets up an agreement made contemporaneously with the giving of the note sued on, whereby Bowman undertook to collect money upon the bills and accounts of the Idaho *World* Printing Company, then in his hands, and apply the same, when collected, in satisfaction of the note, at the same time agreeing between themselves that Ainslie was a creditor of said printing company. And the real question to be determined is, whether such an agreement is valid. Is it such an agreement as could have been introduced in evidence, provided the plea of payment had been directly interposed instead of attempting to set up probative facts, from which the ultimate fact of payment is to be inferred?

It was not lawful for Bowman to agree that there was money due from the printing company to Ainslie, unless he had authority, and none is alleged; and it was not proper for him to pay the money of the company to Ainslie, even though he was a creditor of the company, unless the consent or authority of the company had first been obtained, and no such consent or authority is alleged. If Bowman collected money for that company, as alleged in the answer, unless he had its authority to make some other disposition of it, he became liable to pay it to the company, and no agreement made by him, without the authority of the company, to pay it to any other person, even a creditor of the company, could relieve him from that liability.

It follows that the agreement between Bowman and Ainslie, stated in the answer, is invalid, and can not be enforced. The district court properly sustained the demurrer to the answer; and the judgment must be affirmed.

The judgment of the district court is affirmed, with costs to the respondent.

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JOHN GORMAN, APPELLANT, v. THE COMMISSIONERS OF BOISE COUNTY, RESPONDENTS.

FEES OF ASSESSOR AND TAX COLLECTOR—ROAD TAX.—The assessor and tax collector of Boise county is entitled to retain fifteen per cent. of all road tax collected by him, in full compensation for his services in collecting the same.

IDEM—SCHOOL TAX.—The tax collectors are not entitled to any compensation whatever for collecting school tax or revenue raised for the maintenance and support of public schools under the school law of this territory.

APPEAL from the second judicial district, Boise county.

Huston & Gray, and George Ainslie, for the appellant.

Jonas W. Brown, for the respondents.

CLARK, J., delivered the opinion, HOLLISTER, C. J., concurring specially. PRICKETT, J., also concurred.

This is a controversy without action, brought under sections 567, 568, and 569 of the revised laws of this territory, which provide that parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought.

In this case the agreed statement of facts admits that John Gorman, the appellant, is the assessor and tax collector of Boise county, and, as such, is entitled to the compensation provided by law for the discharge of his official duties. It is also admitted by the respective parties that the real controversy and questions of difference in this case is the amount of percentage allowed by law to the assessor and tax collector of Boise county for collecting the road tax of said county, and also as to whether said tax collector is entitled to any compensation in the nature of percentage for collecting the school tax or revenue for school purposes.

The board of county commissioners of Boise county maintain that the assessor and tax collector of said county is entitled to ten per cent. only on all road taxes collected

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by him, and that he is not entitled to any fee or compensation whatever for collecting the school tax.

The appellant, John Gorman, assessor and tax collector of said county, claims and maintains that he, as such officer, is entitled to fifteen per cent. on all road taxes, and five per cent. on the amount of school taxes collected by him in said county. Upon the foregoing statement of facts and claims of the respective parties, the court below rendered its decision in writing, in substance and to the effect, that the assessor and tax collector of Boise county was not entitled to any fee or compensation whatever for collecting the school tax of said county, and as such officer was entitled to ten per cent. only on all road tax collected by him. From this decision the said assessor and tax collector appeals to this court.

On a review of the statute concerning roads and highways in Boise county, we find that the legislature of this territory, on the tenth day of January, 1873, passed an act entitled "an act concerning roads and highways in Boise county;" this act repeals all acts and parts of acts in conflict with its provisions. Section 5 reads as follows: "There shall be levied and collected, on able-bodied men in each district, a road tax of not more than three dollars, the same to be collected by the tax collector of said county in the same manner as other *per capita* tax are levied and collected, and under the same process for the enforcement of the payment thereof." From the language in this section, we conclude that the legislature intended this tax as a *per capita* tax. Section 6 provides that the tax collector should retain ten per cent. of the amount as collected, in full compensation for his services. This law governed the amount of compensation which the tax collector was entitled to, until the twenty-ninth of December, 1874, at which time the legislature of this territory passed an act entitled "an act fixing the salaries and fees of certain officers in Boise county." Section 4 of this last act provides "that the assessor of Boise county shall receive fifteen per cent. of all poll or *per capita* tax collected, and five per cent. of all other taxes assessed and collected, for his services as as-

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essor and tax collector.” The act of December 29, 1874, repeals all acts and parts of acts in conflict with its provisions, and fixes the compensation of the assessor at fifteen per cent. of all *per capita* tax. The road tax being a *per capita* tax, he was under this last act entitled to fifteen per cent. of the tax collected for his services. This was the law at the date of the submission of this controversy, and must govern the decision of this case, so far as the same relates to the fees or compensation of the assessor of Boise county for collecting road tax.

The assessor and tax collector of Boise county claims that under this last act he is entitled to five per cent. of all other taxes assessed and collected by him, and that the same include school tax. By reference to the school law it will appear that said law was passed subsequent to the act fixing the salaries and fees of certain officers in Boise county, to wit: on the fifteenth day of January, 1875. This act repeals all other acts and parts of acts on the subject to which it relates. It is a general law, and subsequent to the act fixing salaries and fees in Boise county, and repeals so much of the same as relates to fees for collecting other than *per capita* tax, to wit: so much thereof as is repugnant to section 4 of the school law, which reads as follows: “Section 4. That the tax collectors and treasurers of the respective counties shall not receive any fee or percentage for collecting, holding, and disbursing of the moneys so received from said taxes and set apart for public school purposes, but they shall perform such duties without fee or reward.”

In consideration of the premises, it is the opinion and order of this court that the judgment in the court below be affirmed so far as the same relates to the collection of school tax under the school law, and that the same be modified so that the assessor and tax collector may retain fifteen per cent. on all road taxes collected by him in full compensation for his services.

It is further ordered, that the costs herein be taxed in favor of the appellant, and that judgment in the court below be entered in accordance with this opinion.

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HOLLISTER, C. J., concurring.

I concur in the opinion and judgment in this case, but it is due to myself to add that when it was heard by me no briefs nor authorities were furnished by either party, and I was entirely ignorant of the passage of the act of the twenty-ninth of December, increasing the fees for collection of road taxes referred to in the opinion. This act was never published, and no copies, I believe, were ever furnished to the respondents, nor any information given of its existence. As the act was local in its character, and related solely to the fees and compensation of the several officers of Boise county, it may safely be assumed that the appellant knew of its provisions, and in fairness, it seems to me, should have referred me to it.

THE MONARCH G. & S. M. CO., APPELLANT, v. PETER
McLAUGHLIN ET AL., RESPONDENTS.

NEW TRIAL.—After two concurring verdicts, the court will not grant a new trial if the questions to be tried wholly depend upon matters of fact, and no rule of law has been violated; even though in the opinion of the court the verdict be against the weight of evidence.

APPEAL from the second judicial district, Alturas county.

V. S. Anderson, Brumback & Cahalan, and George Ainslie,
for the Appellant.

R. A. Sidebotham and Huston & Gray, for the respondents.

CLARK, J., delivered the opinion. HOLLISTER, J., concurred. PRICKETT, J., having been of counsel, took no part in the case.

This action was commenced on the twenty-fourth day of July, 1875, in the district court of the second judicial district for Alturas county. It is brought for the recovery of the possession of certain silver ore mentioned in the complaint, or the value thereof, to wit, four thousand dollars, in case a return can not be made.

The records of this court show that this action was tried

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by the district court of the second judicial district for Alturas county, at a term thereof held A. D. 1875, and that the jury in the case returned a verdict in favor of the defendants, upon which verdict judgment was rendered accordingly. That afterwards the plaintiff, now appellant, moved for a new trial on the grounds of the insufficiency of the evidence to justify the verdict, and that the law known as the statute of limitations had not been correctly given by the court to the jury. The judge who tried the cause, after hearing the motion for new trial, denied the same, and plaintiffs appealed therefrom to this court. At the January term, 1876, said appeal was heard, and the order refusing a new trial overruled.

This court, in its opinion on that appeal, say, in substance, that because the law governing this case was not given to the jury in writing, and the evidence strongly preponderating against the verdict, the jury must have misconceived the law, or the facts, or were influenced by passion, or prejudice, in order to find their verdict. It is evident from the opinion, that this cause was ordered to be submitted again to a jury, because this court had doubts as to whether justice had been done in the premises.

This cause was tried for the second time in said district court, before a different judge and jury, and a verdict rendered again for the defendants, and judgment accordingly. The plaintiff moved again for a new trial, which was denied by the judge who tried the cause, and an appeal from that order and the judgment is perfected and the cause again submitted to this court. The transcript shows that no exception was taken to any ruling or order of the court made during the progress of the trial. The instructions were given to the jury in writing, and the same is admitted by the counsel for appellant to cover the law in the case. So far as the record shows, the appellant had a fair and impartial trial.

In this case two juries have passed upon the facts and returned concurrent verdicts, and the several judges before whom these trials were had, have in each instance denied the plaintiff a new trial. Hence we conclude that the

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judges considered the evidence sufficient to warrant the verdict.

It has been a debated and vexed question, as to whether, after the court that tried the cause has decided that the verdict must stand, an appellate court can, notwithstanding, order a new trial. The presiding judge has heard, and what is more important, has seen the witnesses testify, noticed their demeanor, listened to their cross-examination; minute circumstances which are often the turning-point in a case have not escaped him. The evidence has been presented full and fresh to his mind after passing through the slow and severe ordeal of judicial scrutiny. He has the benefit of the siftings of counsel. On the other hand the appellate court has enjoyed none of these advantages; it receives the testimony on paper, and thus presented, it is always tame, meager, and unsatisfactory. Its whole knowledge of the case being thus derived, it is but illy qualified to pass an enlightened judgment upon it. The reasons therefore for denying to the appellate court the right to reverse the decision of the judge who tried the cause confirming the verdict, possess great weight; far greater and stronger do they become when we apply them to the present case, where different judges heard the evidence and decided the same to be sufficient to justify the verdict.

Motions for a new trial are addressed to the sound discretion of the court, and are granted or denied, not as a matter of strict right, but as the substantial justice of the case may appear to require. In Indiana it appears that in a civil case, only two new trials can be granted to the same party in the cause upon any grounds whatever. (*Roberts v. Robinson*, 22 Ind. 456.)

This is a harsh and arbitrary rule, and might work great injustice in some cases. It does not obtain to any extent beyond that state. The general rule is, where the issue is solely of fact, that after two concurring verdicts the court will not grant a new trial if the questions to be tried wholly depend upon matters of fact and no rule of law violated, although the verdict be against the weight of evidence.

(1 Graham & Wat. on New Trials, 541, and cases there cited in support of this doctrine.)

In *Swinerton v. Marquis of Stafford*, the court say: The jury, who are the competent judges, have again had the case before them, and have decided it. Even if on nicely scrutinizing all the evidence, we had a doubt whether the verdict was right, it could be never right for us to make no weight of two verdicts of a jury in order to take the chance of a third. (3 Trent. 232.) So in *Talcot v. Commercial and Marine Insurance Co.*, 2 Johns. 467, *per curiam*: “Here have been two trials in each of these causes on the same question of fact. As four different juries have found the vessel seaworthy, and on the last trial some further evidence was adduced on the part of the plaintiff, we do not think it expedient to disturb the verdict. The rule must be denied.”

In *Fowler v. Ætna Fire Insurance Co.*, 7 Wend. 270, the court uses this language: “I still think the verdict on this point is against the weight of evidence, but after two concurring verdicts in a case where there were many witnesses and a great deal of testimony on both sides upon a mere question of fact, supposing there was no misdirection, I should not think it a discreet exercise of the power of this court again to interfere with the finding of the jury.” In *Barret v. Rogers*, 7 Mass. 297, the same doctrine is affirmed, and in *Frost v. Brown*, 2 Bay, 133, after a review of the testimony the learned judge concludes: “After all, if the objections to this verdict had much more weight with me than they have, yet I would not disturb this last verdict for another reason; a second trial has already been granted, and special juries have concurred in finding the same facts. I think we have no authority to proceed any further, for although I would never surrender a plain and certain rule of law to the caprice of a jury, or any number of juries, yet in a case where the law is complicated with facts so that the construction and application of it must depend on the finding of fact, two concurrent verdicts even against the opinion of the judges, ought to be conclusive. I think a third trial ought not to be granted.” Numerous other authorities might

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be cited in support of the doctrine in the foregoing cases; we believe they are sustained by the weight of authority. Counsel for appellants have not cited any case which, in any respect, contradicts or opposes these views. The case cited in appellant's brief (*Campbell v. Jones*, 38 Cal. 507), is not in point—that action was for the recovery of specific personal property, with damages for its detention. The verdict returned by the jury was informal, and not sufficiently definite and certain to serve as a basis for a judgment upon the matters in controversy.

It is claimed by appellant, that the verdict is wholly unsupported by evidence. The record will not support this assertion, because the testimony of witness Tonkin denies every material allegation in the complaint and supports the verdict to its fullest extent. It is true that he is one of the defendants and may be considered as an interested witness, yet notwithstanding his interest, the law makes him competent as a witness and subject only to the same tests for credibility as other witnesses.

This court will not weigh evidence, but review it for the purpose of ascertaining whether error had been committed. We may have doubts as to the correctness of this last verdict, yet as two juries have concurred in the same finding of fact we deem it improper to disturb the verdict.

The order of the court below denying the motion for new trial, and the judgment in this action, is affirmed.

T. CLARK & BRO., APPELLANTS, v. J. LOWENBERG
& BRO., RESPONDENTS. /

PRACTICE—UNDERTAKING ON APPEAL.—If the undertaking on appeal is filed before the notice of appeal is served, the appeal is not effectual for any purpose, and it must be dismissed.

APPEAL from the first judicial district, Nez Perce county.
Motion to dismiss the appeal.

Alanson Smith and J. Brumback, for the appellants.

Huston & Gray, for the respondents.

Points decided.

PRICKETT, J., delivered the opinion. HOLLISTER, C. J., concurring. Clark, J., took no part in this case.

The notice of appeal in this case was filed on the twentieth day of October, 1876. It was served on the twenty-fourth day of October. The undertaking was executed on the eighteenth, and filed on the twentieth day of October, 1876. With this state of facts, the question now is, has this court jurisdiction? Section 438 of the civil practice act of the eighth session laws, relating to appeals, provides that "the appeal is ineffectual for any purpose, unless within five days of the service of the notice of appeal, an undertaking be filed," etc. In order to constitute an effectual appeal to this court, three things are necessary: First, filing the notice; Second, service of the same; and, Third, filing the undertaking. All of these steps must be taken within the times limited by statute. If not so taken, there is no appeal effected, and this court has no jurisdiction of the case. The undertaking in this appeal was filed too soon. The statute does not permit the undertaking to be filed until after the service of the notice; and therefore until such service, there is nothing for the undertaking to operate on. It has no office or function to perform. The case stands therefore as if no undertaking had been given, and there was no appeal perfected.

The appeal is dismissed, but without prejudice.

JOHN GORMAN, APPELLANT, v. THE COMMISSIONERS OF BOISE COUNTY, RESPONDENTS.

OFFICE—OFFICER—FEES.—A. was duly elected to the office of assessor and tax collector, and presented his bond for approval to the county commissioners, who refused to accept it, and thereupon appointed B. to fill the office. B. duly qualified, collected the taxes, and received compensation therefor: *Held*, that A., on being restored to office, could not recover from the county the fees to which he would have been entitled if in office.

IDEM.—The right to compensation is an incident to the services rendered, and not to the office.

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OFFICER DE FACTO.—The incumbent of an office, though only an officer *de facto* under color of right, is alone entitled to compensation for the services performed by him.

COMPLAINT—OBJECTIONS TO.—Where a party shows no right to recover, objections to the complaint or other pleading may be taken for the first time in the appellate court; and where a party shows no right to recover under any possible state of proof, the court is not bound to submit the case to a jury.

APPELLATE COURT—REMANDING CASE.—When the appellate court is in possession of all the rights of the parties, and can render full and complete justice, it will not remand the case for further litigation.

LACHES—DEFECTIVE COMPLAINT.—No laches is imputable to a defendant for not interposing objections to the complaint at the first opportunity, when it appears that the plaintiff is not entitled to recover.

APPEAL from the second judicial district, Boise county.

George Ainslie and Huston & Gray, for the appellant.

Jonas W. Brown, for the respondents.

HOLLISTER, C. J., delivered the opinion, CLARK, J., concurring. PRICKETT, J., having been of counsel, took no part in the case.

The case shows that on the fifth day of November, 1872, appellant was duly elected to the office of assessor and tax collector of Boise county, for the years 1873 and 1874, and on his failure to procure the approval of his official bond, the board of commissioners of the county declared the office vacant, and Ben. T. Davis was appointed in his place, fulfilled the duties of the office, collected the taxes, and received the fees allowed by law, as compensation for his services, amounting to the sum of four thousand nine hundred and fifty-one dollars and thirteen cents. On proceedings instituted for the purpose, the action of the board was declared by this court to be null and void, and appellant was adjudged to be entitled to the office.

On the seventh of April, 1874, appellant presented his claim against the county to the board of commissioners for the amount paid Davis, alleging that by virtue of his office he was justly entitled thereto, which was disallowed by the board by an order duly entered upon its records, from which appellant took an appeal under the statute to

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the district court of the county, stating in his notice of appeal the foregoing facts, though in a more extended form, as the grounds of appeal as required by law.

On the hearing of the appeal, the district court, instead of affirming, reversing, annulling, or modifying the order appealed from as the statute requires, entered judgment against the board of commissioners and the county for the full amount claimed, together with interest and costs. From this judgment the board of commissioners appealed to this court and the judgment was reversed, on the ground that the district court erred in rendering a money judgment, and remanded the case for a new trial on the whole case, without directions for a *venire de novo*.

At the March term, 1876, of the district court, respondents interposed a demurrer to the claim and statement of the grounds of appeal from the order of the board of commissioners, etc.—alleging, among other reasons, that the account, notice of appeal, and alleged grounds of appeal do not state facts sufficient to show that said account was legally chargeable against the county. This demurrer was sustained by the court, and a judgment was entered that the order of the board of commissioners rejecting appellant's claim be affirmed. From this judgment appellant brings his appeal.

It can not be doubted that as against the person who has kept one out of office, by intrusion, an action would lie for the injury, and the lawful perquisites which he would have received if in office, would be a proper subject of inquiry. (Campbell, C. J., in *The Auditors of Wayne Co. v. Benoit*, 20 Mich. 176). Our statute, sec. 278, p. 133, of the second session laws, and also the revised code, sec. 338, p. 158, have recognized his right to such redress, and provided for the recovery of damages by action. Public offices in this territory are not incorporeal hereditaments, nor have they the character or qualities of grants. They are agencies. They are voluntarily taken, and may, at any time, be resigned. They are created for the benefit of the public, and not granted for the benefit of the incumbent. Their terms are fixed with a view to public utility and convenience, and not

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for the purpose of granting emoluments, during that period, to the office holder. The prospective salary or other emoluments of a public office are not the property of the officer, nor the property of the state. They are not property at all. They are like daily wages unearned, and which may never be earned. The incumbent may die or resign, and his place be filled, and the wages earned by another. (*Connor v. The Mayor of N. Y.*, 5 N. Y. 285.) “An office is not property, nor the prospective fees of an incumbent. The right of fees does not grow out of any contract between the officer and the government. The right to fees arises from the rendition of services.” (*Smith v. Mayor of N. Y.*, 37 Id. 518.)

In the case of *Smith* ads. *The People*, 28 Cal. 21, the supreme court of California held that the right to compensation was an incident to the office, yet this is not considered as law. There was no reasoning on which the decision was based, and the case in New York relied on in support of it, was overruled in 37 N. Y. 518, above quoted.

In 20 Mich. 176, above cited, it was held that the right to compensation belongs to the incumbent of an office, holding under color of right, for services rendered, and not to the officer *de jure*, who has been kept out of office, but who has not entered upon its duties.

The appellant never entered upon the duties of his office until after Davis had performed the services and received the compensation. It is true he was prevented from doing so by the erroneous action of the commissioners, but he did not earn the fees, and Davis did, under color of right, and had a legal right to them, of which the county could not deprive him. His official acts, while acting as an officer *de facto*, under color of an appointment by the board, were binding upon third persons, and upon the people, and no inquiry could be had as to his right to compensation for his services so long as he was the acting officer. Any payments made to him for services rendered in the discharge of his public duties, while an incumbent of the office, were valid and binding, and the county can not be made liable to pay a second time.

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It is urged that the board of commissioners acted in violation of their duties in appointing Davis to the office, which legally belonged to appellant, and in doing so a wrong was committed by which he suffered injury. Conceding that their action was erroneous, and that appellant was wronged thereby, still the county can not be made responsible for it. Counties are created *in invitum*, for certain political or governmental purposes. They are but parts of the machinery by which the affairs of the people are conducted, and they stand in the same relation to the agents which they are obliged to select in aid of the public services as the government of which they are parts, and can no more be held responsible for their acts than can the entire government. In selecting these public agents, they act not voluntarily, but under the compulsory requirements of the law. When chosen these agent become public officers, clothed with certain functions defined by law. The counties have no control over their actions, and can give no directions as to the manner in which they are to discharge their duties, nor can they remove them at their pleasure. These officers act entirely independent of the people who choose them, and as a consequence are not responsible to them, except politically, for any official act performed, nor are the people at large or of the counties amenable to any one for their neglect or misfeasances.

It may be, if a board of commissioners, or any other public officer, willfully and corruptly do any act, under cover of lawful authority, by which a person is injured, that they may be held answerable to such person. The legislature, in providing for the compensation of public officers, undoubtedly contemplated that it should be for services rendered, and it follows that any one qualified to perform the services is entitled to compensation therefor.

As has been seen, Davis was not a mere intruder, without any claim or color of title. He received his appointment from a body authorized by law to make it, and was clothed with all the *indicia* of office. He made the collection in a legal manner, and in doing so, his acts were as binding upon the public as they would have been had he been act-

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ing as an officer *de jure*. The public were more interested in the collection of the taxes than they were in the claims of either party to the office or its emoluments. The services having been performed by Davis, he alone was entitled to the fees, and when payment was made to him, the responsibility of the county ceased. As was said, in the case referred to in 20 Mich.: "There may be cases where the redress of the aggrieved party will be difficult. But the public convenience is not on that account to be sacrificed. It is important to have the right man in office, but it is more important to be able to deal safely with those who are actually in place." So long as Davis held the office, no inquiry could be had collaterally as to his right thereto. The whole public interests would have been thrown into confusion, if the taxpayer could have refused to pay taxes, or the county his fees, on the ground that he was not properly in office. The collection of the revenue could not be delayed until the title to the office was judicially determined, nor could Davis be compelled to establish his claim to the office before proceeding to the collection of the revenue. Being thus compelled to act as an officer *de facto*, he was entitled to compensation for his services. Until he ceased to be an officer, the collection of taxes by him, as well as payments made therefor, were lawful.

It is suggested that it nowhere appears in the papers demurred to that Davis was not paid for his services. It is a sufficient answer to say that appellant makes no allegation of that fact, and as this was essential to his right to recover, it should have been averred. The presumption arising from this failure, must be that Davis received his compensation when the services were performed. The law, presumptively, knows no credit. It must be made to appear by allegation and proof.

It is insisted by appellant's counsel that the district court erred in allowing the demurrer to be interposed for the first time, after one trial was had upon the facts, and a new trial ordered by the supreme court. Proceedings of this character must be governed by the statute relating to them, or, where the statute is silent, by the ordinary course of pro-

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ceedings as at common law. The order of the supreme court remanding the case for a new trial gave no directions that a new trial should be had upon the issues of fact as they then stood, and this left the district court to determine whether it was proper to try an issue of law in the first instance before letting the case go to the jury upon an issue of fact.

On an appeal from an order of the board of commissioners the statute requires that the party appealing should state in his notice of appeal, the fact of his appeal, and the grounds of appeal. The appellant followed these requirements, and stated his case fully, by showing the grounds on which he based his right to recover, and the reasons why, as he claimed, the board erred in rejecting his claim. The object of the statute most clearly is, to advise the district court, on an appeal, of any errors the board had committed, by an inspection of the statement, and should the court upon such inspection determine that no error had been committed, it was its duty to affirm the order. Under the statute no other written pleadings or statement were required, and hence questions of law might be prevented, either by a motion to dismiss, as contented for by appellant's counsel, by inspection, or by demurrer. If the end could be attained by either mode, and the same result arrived at, it was not error to adopt either of the three.

Section 19 of the act, which gives the right of appeal and regulates the mode, requires the case, upon appeal, to be heard *de novo*, but whether upon an issue of law or of fact, it is entirely silent. In such a proceeding there is nothing in principle, and certainly not in the law, which requires the appellate court to let the case go to the jury, when by the appellant's own showing he is not entitled to recover. Where the court is satisfied a party, by his own showing, can by no possible state of proof recover, it is not bound to submit the question of fact to a jury. (*Edmondson v. McLeod*, 16 N. Y. 543; *Griffin v. Marquardt*, 17 Id. 28; *Brown v. Bowen*, 30 Id. 519.)

It is well settled that where a party shows himself not entitled to recover, and a verdict is found in his favor, ob-

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jection for the first time may be taken on appeal. (7 Barb. 581; *Hentsch v. Porter*, 10 Cal. 555.) And this, though a demurrer be not filed. (*White v. Pratt*, 13 Id. 521.) Suppose the case, when remanded, had gone to the jury, and the verdict had been for the appellant, upon the facts shown by his statement, most assuredly it would have been the duty of the court to set aside the verdict as against the law, and so too it was its duty to refuse to submit the case to the jury, where such a result would follow. (*Godin v. Bank of Commonwealth*, 6 Duer, 76.)

From these considerations it follows that respondents were guilty of no laches, in not in a formal manner presenting the issue of law to the court until after the case was remanded for a new trial. It was the duty of the court to determine whether the appellant had presented a claim which gave him a right of action, whether a motion was made to dismiss the appeal, or a demurrer was interposed to his statement or not. An objection can never come too late, where the other party shows no right of action under any possible state of proof.

Upon the primary and principal question that appellant shows no right to recover, my associate, Justice Clark, agrees with me, as I understand him, but he seems to think the demurrer was not in apt time, and that the court erred in not letting the case go to the jury. Where this court is in possession of all the rights of the parties, and full and complete justice can be done, it is not its duty to send the case back for farther litigation.

The judgment of the district court is affirmed, at the costs of the appellant in this court and the court below.

THE PEOPLE, APPELLANTS, v. C. W. MOORE, RESPONDENT.

TAXATION—BLENDING TAXES.—The blending together of the several different kinds of taxes, in an assessment roll, invalidates the entire tax.

CONSTRUCTION OF STATUTES.—Acts of the legislature are not to be construed retrospectively, so as to take away vested rights, although they may alter or modify the remedy, nor can a healing act affect existing judgments.

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SUITS FOR TAXES—COSTS.—In a suit for taxes, although the defendant recovers, the judgment should be general, without costs.

APPEAL from the second judicial district, Ada county.

F. E. Ensign and J. Brumback, for the appellants.

R. Z. Johnson and Huston & Gray, for the respondent.

PRICKETT, J., delivered the opinion. **HOLLISTER, C. J.**, and **CLARK, J.**, concurred.

This action was instituted to recover taxes on five hundred and eighty shares of stock in the first national bank of Idaho. It is alleged in the complaint that there was duly levied and assessed thereon, for the fiscal year 1875, a territorial tax of four hundred and thirty-eight dollars and seventy-five cents, and a county tax of eight hundred and twenty-seven dollars and fifty cents. The answer denies, among other things, that said taxes were duly assessed, and also that any taxes were due from defendant to plaintiff. The cause was tried by the court, without a jury, and the assessment roll of 1875 being introduced in evidence, it appeared therefrom that all the different kinds of taxes were blended together and set down in a column headed "Total taxes," and that there were no columns or spaces in the roll for the several different kinds of taxes of which the total taxes are composed. The court below held that plaintiff could not recover because the several kinds of taxes were not apportioned and placed in separate columns; and rendered judgment on the merits, in favor of the defendant, and also awarded and adjudged the costs of suit against the plaintiff. A motion for a new trial was afterwards made upon a statement of the case, which motion was denied, and the plaintiff appeals to this court from the judgment and the order denying a new trial. On the ninth day of January, 1877, since the appeal was perfected, the legislature passed an act entitled "An act to legalize the assessment, the assessment roll, and delinquent list of Ada county, for 1875."

The errors assigned are, in substance, that the decision of the district court is against law in holding that it was necessary to a valid assessment, that the assessor

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should place in separate columns the different kinds of tax; that he should apportion the taxes, separating the county from the territorial; and that it was error for the court to render judgment in favor of the defendant for costs. It is also urged by the appellant, that the defect in the assessment, if any existed, has been cured by the act of January 9, 1877. It is further claimed, now here, for the first time, that the defenses set up in the answer are prohibited by section 39 of the revenue act. This last objection might properly have been made in the court below by demurrer to the answer, but as it goes to the whole defense, and is one of the objections that, under the statutes, is never deemed to be waived, it may be raised for the first time in this court, and we will first consider and dispose of that objection.

There is nothing in the record which shows that the defendant was, at the time of the assessment, the owner of real estate, within Ada county, of the value of three times the taxes due from him; nor anything to show that he was then the owner of any real estate, except the allegation in the complaint that there was assessed to him real estate upon which the taxes had been paid. Section 27 of the revenue law provides that "the county assessor shall be *ex officio* tax collector, and is hereby authorized to receive and collect all poll taxes, and hospital taxes, except traders', gambling, hurdy-gurdy, and bawdy-house licenses, until such time as required to complete the assessment; and upon the entry of movable property to any person, firm, corporation, association, or company who does not own real estate within the county, of an actual value equal at least to three times the amount of all the taxes due and owing from such person, firm, corporation, or company, to demand the payment of taxes on the same." It further provides that in case of neglect or refusal to pay such taxes, the assessor shall seize sufficient personal property of the party and proceed, summarily, to sell the same, or sufficient thereof to satisfy the taxes and costs of sale.

We can not presume that the defendant was the owner of real estate equal in value to at least three times the amount

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of the taxes due and owing by him, but on the contrary, the presumption is that the plaintiff stated its case in the complaint as strongly as the facts would warrant, and that the defendant's real estate was not of that value. The property upon which the taxes are sought to be recovered in this action is of that character, for aught the record shows, upon which the taxes should have been collected by the assessor as *ex officio* tax collector; by distraint and sale of that or other personal property belonging to the defendant, as provided by that section of the revenue act.

The suit prescribed by the revenue laws, for the recovery of taxes, is to be resorted to in cases where the party is the owner of immovable property or real estate, sufficient in value to secure the full amount of taxes by reason of the lien which the assessment creates, and also to secure the probable costs of enforcing such lien and collecting the taxes by suit; and the legislature by this statute has determined that such property must be of at least three times the value of the total taxes, in order to constitute sufficient security. Section 39 of the revenue act, prescribing and limiting the answer and defenses, is applicable to such statutory action only, where the taxes sued for are due upon real estate, or upon mixed property, consisting of both real and personal. It can not be claimed that it was intended to be applied to a suit of this character, because it is provided and contemplated by the statute, that the taxes sought to be recovered in this action should have been collected in another mode, viz., by distraint and sale. The limitation of the defenses which may be set up, is in derogation of the general rule, and ought not to be extended to cases which are not clearly within the letter of the law limiting them; certainly not to cases in which another mode for collecting the taxes is specially provided. An action may be maintained to recover taxes on movable property, not by virtue of section 39 of the revenue act, but as an additional or cumulative remedy to that specially prescribed by section 27 of the statute, and by virtue of the common law right to sue upon an obligation or liability, and in such a case the ordinary rules of pleading must govern; the defendant may,

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by answer, deny any of the material allegations of the complaint. We conclude that the answer in this case is sufficient as a defense.

The next question to be considered is, did the district court commit error in deciding that the assessment was invalid because the several different kinds of taxes were not separately set down in the assessment roll? Section 2 of the revenue act provides that "the board of commissioners of such county shall, prior to the first Monday in April, each year, cause to be prepared suitable and well bound books, for the use of the assessor, in which he shall enter the tax list, or assessment roll, as hereinafter provided. Said books shall contain suitable printed or written heads, and be ruled to conform with the form of the assessment roll as provided by this act." Section 18 of the same act provides that "it shall be the duty of the assessor to prepare a tax list, or assessment roll, alphabetically arranged, in the book or books furnished him by the board of commissioners for that purpose, in which book or books shall be listed or assessed all the real estate, improvements on public lands, and all personal property within the limits of the county; and in said book or books he shall set down in separate columns: 1. The date of the assessment. 2. The names of the taxable inhabitants, etc. 3. All real estate and improvements taxable to each inhabitant, etc. 4. The cash value of real estate, and improvements thereon. 5. The cash value of all improvements on real estate when the same is assessed to a person other than the owner of said real estate. 6. The cash value of all personal property, etc. 7. The total value of all property taxable to each, etc. 8. He shall also place in a separate column, opposite the name of each person liable to pay a poll tax, the figure one (1). The form of the assessment roll shall be substantially as follows." Then follows the form, the four last columns of which are headed respectively as follows: "territorial tax," "county tax," "total tax," "remarks." Section 23 provides, among other things, that, after the board of equalization has performed its duties with reference to the assessments, the clerk of said board shall

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“carry out in a separate money column, the totals of taxes composed of territorial, county, and other taxes to each person, etc.”

It is clear, from the several provisions of the revenue act, that it is the duty of the board of commissioners to furnish the assessor with a book, or books, in which there is a column for each different kind of tax to be collected for that year; that it is the intention and meaning of the law that all these columns shall be properly filled, and that the totals of taxes shall be carried out in a separate money column. The language of the law, as well as the form of the assessment roll prescribed by it, considered either separately or together, lead irresistibly to this conclusion.

It is an established rule that when a particular form of assessment roll is prescribed by the statute, that form must at least be substantially followed; the courts will not admit the substitution of a different one. It is a substantial right of the person assessed that he should be informed by the assessment roll itself, what the character of each item of the total taxes is; whether they are such in kind and amount as the law levies or authorizes to be levied. It is important that he should be so advised, in order that he may pay or offer the amount of any one tax which he believes to be authorized by law, and to resist the collection of any which he deems illegal. It is quite impossible to determine from the assessment under consideration, whether any portion of the tax is of a kind levied or authorized by law, and its introduction as evidence does not establish the facts alleged in the complaint, viz.: that a territorial tax of four hundred and thirty-eight dollars and seventy-five cents, and a county tax of eight hundred and twenty-seven dollars and fifty cents, was levied and assessed upon the property described for the year 1875. These views are thoroughly supported by authority. In the case of *The People v. The New York and Owyhee Mining Co.*, and other cases decided by this court at the January term, 1870, it was held that the valuations of real estate and personal property could not legally be set down in an aggregate column or amount; and that if such valuations were blended together, the whole assess-

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ment was invalidated. The reason given by the court in those cases was, that the taxpayer must be informed by the assessment roll what value is placed upon the real, and what on the personal property, so that he may determine whether or not to apply to the board of equalization for a reduction, on either class of property, or upon any description of real estate. It is quite as necessary, for the reasons given above, that the taxes should be separately stated.

Blackwell, in his work on tax titles, says: "Taxes ought to be kept separate, not blended together, so that the taxpayer may look into each one of the taxes separately and have its legality determined. A confusion of the several taxes can not take place without invalidating the whole assessment." (Blackwell on Tax Titles, 163.) The case of *Merrill v. Swartz*, 39 Ill. 108, was an action of ejectment in which the plaintiff relied for a recovery upon a tax sale and deed, and the question was as to the validity of the title. The revenue law of that state under which the decision was made, required the collector to file with the county clerk a list of the delinquent lands or town lots five days before the commencement of the term at which application for judgment was to be made. The law further provided that the clerk should receive and record this report in a book to be kept for that purpose; "which book shall be ruled and headed as near as may be in the following form." A form is then given, from which it appears that this report should show the owners' names, the description of the land, the valuation, the state tax, the county tax, the costs, and the total amount due. The court says: In the case at bar, the report gives the total amount of taxes, but does not state what portion is state and what portion is county tax. This is a fatal departure from the law. Here are two sources of taxation, and parties, whose land is sought to be condemned, have a right to be informed which tax it is that is alleged to be unpaid, in order that they may make defense.

In the case before us the report does not even show that the delinquent tax was due, either to the state or county. It simply shows, in the language of the report, "amount of

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tax." In proceedings of this character, such an error must be held fatal.

In the case of *Thayer v. Stearns et al.*, 1 Pick. 432, which was a case of trespass against the assessors for taking a chaise, etc., the property of the plaintiff, for taxes, Chief Justice Parker, in delivering the opinion of the court, said: There are several points in this case which would require much consideration if it were necessary to give an opinion upon all of them. The objection made by the plaintiff, which we think insuperable, is the blending together the several taxes for state, county, and town.

We think it clear that the legislature intended they should be assessed separately, and put in different lists or assessments. This intention is manifested by the special provision, on account of the comparative smallness of the county tax, that it might be added to the town or state tax. This provision would not have been necessary if they might all have been assessed together, and it is never lawful, in the construction of statutes, to impute useless or frivolous conduct to the legislature. Whether there was any sufficient reason, in our opinion, for this separation of the taxes, is of no importance; but the object undoubtedly was to enable the citizen to scrutinize with more facility his taxes, that he might the better exercise his judgment as to their fairness and legality. Cooley, in his new and valuable work on taxation, page 295, says: A very common provision of the statute, where several taxes are to be spread upon the same roll, is, that they shall be kept separate and placed in distinct columns on the roll. This advises the taxpayer of the nature of the several demands that were made upon him, and enables him to pay or tender the amount of any one, the legality of which he concedes, and to decline to pay any other if he considers it unwarranted. Such provision is mandatory, and if not obeyed the taxes can not be enforced. A custom to blend them can not make the roll valid. But separating the taxes, when the statute does not require it, will not affect the roll, as this deprives no one of any right whatever.

But it is insisted by the appellant that our statutes re-

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quiring the several taxes to be kept separate, are directory, and they base this claim on section 39 of the revenue act, which provides that "the acts between the assessment and the commencement of suit shall be deemed directory merely." The determination of this question depends upon the construction to be given to the word assessment, as used in this section. The general rule of construction, as applied to statutes relating to the assessment and collection of taxes, is that what the law requires to be done for the benefit or protection of the taxpayer is mandatory, and can not be considered directory merely. That all those things which were intended to inform the taxpayer for what real and personal property he is taxed, and the character and amount of the several taxes demanded of him, are conditions precedent, and if they are not closely observed, he is not legally taxed, and may resist the collection. This is the reasonable and just rule; and before the courts can abrogate it and give such interpretation to the statute as would be against reason and contrary to justice, it must unequivocally appear that the legislature has, intentionally, prescribed a different one.

The words "assessment" and "assessed" in the revenue act are sometimes used in a limited, strict sense, as reaching and extending only to the act of estimating the values which are to form the foundation or basis of taxation; they are also used in the general and more extended sense as implying the completed tax list, that is to say, the names and list of the persons to be taxed, with the valuations of their property, and the taxes set down under the several headings, and properly extended and carried out. The word assessed is used in the latter sense in the complaint in this case in alleging that the taxes sought to be recovered were "duly levied and assessed" upon the property described; and such, we hold, is the meaning and construction to be applied to the word assessment, as used in section 39 of the revenue act. It follows that the district court did not commit any error in deciding that the taxes were invalid.

But it is claimed by the appellant that the defects in the assessment have been cured by the late act of the legisla-

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ture, and that this court must be governed in its decision by the law as it now is. We can not agree with counsel in this respect. This cause is pending in this court upon what is denominated an appeal, which differs from the writ of error only in the mode of bringing the case up for review, and in the form of proceeding. The principles governing the decision are the same as upon writ of error, and the questions to be decided are: Does the record disclose error? Was there error in the judgment of the court below at the time it was rendered? The case of *Barnet v. Barnet*, 15 Serg. & R. 72, is directly in point on this question. In delivering the opinion of the court in that case, Tilghman, C. J., said: "Since the judgment in this case in the court of common pleas, an act of assembly has been passed for curing defects in the acknowledgment of deeds by married women. Had this act been passed before the judgment below, it would have cured the defect above mentioned in the demandant's acknowledgment, and there would have been error, in the court's opinion. It is our unanimous opinion that there is nothing unconstitutional in the act of assembly; but it is also our unanimous opinion that it does not extend by retrospect to render a judgment erroneous, which was entered before its passage."

The question now to be decided is whether there was error in the judgment below at the time it was rendered. And we are of the opinion there was not.

It is the first principle in legislation that all laws are to commence *in futuro*, and nothing but the most unequivocal expression can justify a retrospective operation. There is nothing in the act in question which shows an intention on the part of the legislature that it should be applicable to this case. It is not to be presumed that, by its mere act, the legislature intended to confer upon the appellate court power to determine the appeal, not by the pre-existing rules of law which fixed and controlled the rights of the parties, under which the defendant elected whether he would incur the costs of a defense, but by a law empowering the court to do what could not be done before. If such intention was manifest from the act, we should be obliged to decide, both

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upon principle and authority, that it was not within the legitimate power of the legislature to extend the act, by retrospect, to render the judgment erroneous which was entered before its passage, and thus deprive the defendant of a vested right to his judgment, subject to be reversed only for error of the district court. Let us illustrate this by some of the judicial decisions. In *Couch v. Jeffries*, 4 Burr. 2460, which was an action for a penalty, and a verdict obtained by the plaintiff, motion to stay judgment on the ground of payment of the duties having been made into the stamp office before September 1, 1769, under an act of parliament which says: If the duties before neglected to be paid shall be paid in, on or before the first of September, 1769, the person who has incurred the penalties shall be discharged of and from the said penalties. The question was whether the act related to actions brought before. It was decided by the court that it did not, and it was said by Lord Mansfield: "Here is a right vested, and it is not to be imagined that the legislature could, by general words, mean to take it away from the person in whom it was vested, and who had been at costs in presenting it. They certainly mean future actions. It never can be the true construction of this act to take away a vested right and punish the innocent pursuer of it with costs."

In *Dart v. Van Sleet*, 7 Johns. 501, Chief Justice Kent observes: As this act was passed, not only after the escape, but after suit brought, it can apply to and govern the case in but one of two ways: it must be considered either as creating a new rule for the government of the past case, or as declaring the interpretation of the former statutes for the direction of the court. I should be unwilling to consider any act so intended, unless that intention was made manifest by express words, because it would be a violation of fundamental principles, which is never to be presumed. The very essence of a new law is that it is a rule for future cases. The construction contended for would make the statute operate unjustly. It would make it defeat a suit already commenced or a right already vested. It would be

Points decided.

punishing an innocent party with costs as well as divesting him of a right previously acquired under existing laws.

The importance to the public of the questions involved in this case, and others depending on its decision, will afford me an excuse and justification for the length of this opinion. I consider it my duty to give the subject full investigation; to state the ground of that opinion as well as the reasons and authority upon which it is founded.

Section 41 of the revenue law provides that in suits for taxes, in case judgment is rendered for the defendant, it shall be general, without costs. The court below erred in awarding defendant his costs.

The judgment of the district court is affirmed, except as to costs, and said court is directed to modify its judgment by annulling and striking out so much thereof as awards costs to the defendant. The order denying a new trial is affirmed.

Whereas, the appellant was obliged to appeal in order to be relieved of the costs adjudged against it in the district court, it is adjudged that the respondent pay the costs of appeal and of this court.

LILLIENTHAL & CO., APPELLANTS, v. CHRIS. ANDERSON, RESPONDENT.

CONTINUANCE.—Upon an affidavit showing the absence of a material witness and that proper diligence has been exercised, a party is entitled to a continuance.

MOTION FOR NEW TRIAL—PRACTICE.—On a motion for a new trial, on the ground that the court denied a continuance, the moving party should procure the affidavits of the absent witnesses showing that they can testify to the facts sought to be proven; or show sufficient reason for not obtaining such affidavits.

IDEM—SURPRISE—EVIDENCE OF.—On a motion for a new trial, on the ground that the party was taken by surprise by reason of one of his own witnesses failing to testify to a material fact which the witness had previously stated in the presence of others he could testify to, the affidavits of the persons in whose hearing such statements were made, are the best evidence of the surprise, and should be produced.

INSTRUCTIONS—ADMISSIONS OF PLEADINGS.—It is error for the court to instruct the jury that it is necessary for the plaintiff to prove facts alleged

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in the complaint and not denied by the answer. The failure to deny a material allegation contained in a complaint, is an admission of it; and the admission is conclusive evidence of the fact admitted.

EVIDENCE.—Evidence which is capable of affording an inference of a fact, or which constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it, should be admitted. It is error to reject such evidence.

APPEAL from the second judicial district, Boise county.

George Ainslie, for the appellants.

Jonas W. Brown and Huston & Gray, for the respondent.

PRICKETT, J., delivered the opinion, **CLARK, J.**, concurring; **HOLLISTER, C. J.**, dissenting.

The complaint in this action alleges, in substance, that the defendant and one James Thompson were partners, doing business as saloonkeepers, at Placerville, in Boise county, under the firm name of James Thompson; and, for a first cause of action, that said firm became and were indebted to plaintiffs, at a date and in a sum mentioned, for goods, wares, merchandise, liquors, etc., sold and delivered by plaintiffs to said firm. For a second cause of action: That said firm became and were indebted to F. Miller & Co., upon account, etc., and that said account and the balance due thereon had been assigned to plaintiffs. It further alleges, that since said indebtedness was created, Thompson died, leaving the defendant the sole surviving partner.

To this complaint the defendant answered, denying that he ever was a copartner of James Thompson; and to the first cause of action, "he denies that this defendant ever became indebted" for goods, wares, merchandise, etc., sold and delivered by plaintiffs to James Thompson and defendant, or to defendant individually. The answer as to the second cause of action denies that he, defendant, ever became indebted for goods, etc., sold by Miller & Co. to Thompson and defendant, or to defendant individually, or that there ever was any balance of account due to Miller & Co. from him, the defendant.

The term of court at which the cause was tried, com-

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menced March 7, 1876, and on that day, upon a call of the calendar, the trial was fixed for March 11. Upon the day set for trial, the plaintiffs moved for a continuance, upon affidavits showing that immediately after the case was set for trial, plaintiffs caused subpoenas to be issued for their witnesses, and among others, for one Thomas Williams, who resided at Placerville, in Boise county, and was known to have been there as late as March 6, 1876. That the subpoena was placed in the hands of an officer, with money to pay witness his *per diem* and mileage; that the officer after due search has been unable to find Williams, and so returned. That afterwards another subpoena was issued and placed in the hands of the officer with like result: that the witness, Williams, was on very friendly terms with defendant. The evidence expected to be obtained from said Williams was set forth in the affidavits, and it was material upon the issue of partnership. It was further shown that it had been the practice, ever since the organization of the court, to cause subpoenas to issue for witnesses residing in the county, immediately after cases were set for trial. The affidavits in other respects were sufficient. The court refused a continuance, on the ground of want of diligence in not issuing subpoenas before the commencement of the term, to which ruling the plaintiffs excepted. The cause was tried by a jury, and in the course of the trial the plaintiffs offered to prove that a certain building, then occupied and claimed by defendant as his own, but occupied by Thompson as a saloon building, in his life-time, was built by defendant and Thompson in partnership, and that the material used in its construction was paid for out of the cash receipts of the saloon business. The court sustained objections to this and other testimony, and rejected the offered evidence, to which plaintiffs excepted. Both parties prepared certain instructions and requested the court to give them to the jury. The court gave those requested by defendant and refused certain of those presented by plaintiffs. To this action of the court plaintiffs excepted.

The fifth and sixth instructions given at the request of the defendant, which are the only ones necessary to be noticed

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here, are nearly in the same language, and to the effect that it was necessary to a recovery by the plaintiffs, that they should prove the sale and delivery of the goods, etc., as alleged in the complaint. The jury rendered a verdict for the defendant, and judgment was entered in his favor for costs. In due time the plaintiffs moved for a new trial upon affidavits and a statement of the case, alleging as grounds for the motion abuse of discretion in refusing a continuance, by reason of which plaintiff was prevented from having a fair trial; errors in law occurring at the trial, and excepted to; in refusing the instructions asked for by plaintiff, and in giving those required by defendant; and surprise which ordinary prudence could not have guarded against, in that one of plaintiffs' witnesses had failed to testify upon the trial to a material fact, the truth of which he had previously declared in the presence of several persons named. The motion for a new trial was denied, and the plaintiffs appealed from the judgment and from the order denying a new trial. We have been thus particular in stating the history of this case, in order that the points arising on the appeal may be clearly comprehended.

The first point we shall consider is, whether the court abused its discretion in refusing a continuance, and whether, in case it did, the plaintiffs have kept themselves in a position to take advantage of the error. The granting or refusing a continuance rests in the sound discretion of the court by which it is made, and it is only in cases where an unreasonable discretion is exercised that this court will interfere. It is by this rule that we must be governed in deciding whether the court erred or not in refusing a continuance. We have examined the affidavits for a continuance critically, and have failed to find any defect in them. They show that, in accordance with the settled practice of the court, which is its law, until changed upon due notice, the plaintiffs caused subpoenas to issue for witnesses as soon as the cause was set for trial, and that in all respects due diligence was used to procure the attendance of the witness Williams. The jury law of this territory provides that no

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petit jurors shall be summoned until after a case requiring a jury is set for trial at an hour fixed, and that all cases requiring a jury shall be set down for trial so as to be tried consecutively, etc. It is clearly contemplated by this law that the trial of all jury cases shall be set for a time certain, and without regard to the practice or rule of the court on the subject; if the parties can reasonably expect to procure the attendance of their witnesses, in cases for trial by jury, as soon as a jury can be procured to serve at the term, sufficient diligence is exercised by causing subpoenas to issue when the case is set for trial. The plaintiffs were entitled to a continuance upon the showing made; but we can not interfere to grant a new trial for this reason, because it was necessary for the plaintiffs, upon their motion for a new trial, in order to avail themselves of this ground, to have produced the affidavit of the absent witness showing that he could testify to the facts sought to be proved by him, or it should be shown that such affidavit could not be procured.

Neither can we grant a new trial on the alleged ground of surprise, because the rule just stated is equally applicable to motions made on this ground. The surprise should have been shown by the best and most satisfactory evidence within the reach of plaintiffs, which was the affidavits of persons in whose hearing the witness stated that he could testify to the truth of matters which he failed to state when questioned on the witness stand.

In giving the instructions numbered five and six, at defendant's request, to the effect that it was incumbent upon the plaintiffs to prove a sale and delivery, the court unquestionably committed an error, there being no denial in the answer of those facts alleged in the complaint. It is true that the defendant pretends to make answer to the two several causes of action set forth in the complaint, denying that he ever became indebted for the goods alleged to have been sold; but this is not the allegation of the complaint. The plaintiffs charge that the goods were sold and delivered to an association of persons, a partnership; and this, not being denied, except in so far as it is controverted by the denial of the existence of the partnership, is, when the

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partnership is established, admitted as a fact. The object of the rules of pleading is to prevent evasion, and to require a denial of every material specific fact or averment, both in substance and in spirit; and the defendant is always held to an admission whenever he fails to make such denial. This was the law under the old equity system of pleading, which rules were, probably, the most perfect for the ascertainment of truth ever devised; and they are not less the rules of our code system, under which the admission of a fact stated in the complaint is conclusive against the defendant.

It would seem to be almost superfluous to quote authorities upon a proposition so well established and so perfectly understood, and yet we refer to a few. In the case of *Burke v. Table Mountain Water Co. et al.*, 12 Cal. 407, Baldwin, J., delivering the opinion of the court, says: The complaint charges that the defendant, the Table Mountain Water Co., was in possession. The answer of the company does not deny this averment in any such manner as to put it in issue. What the complaint called the defendant to answer was, not only the character, but the fact of possession by it, and a failure to deny this averment is an admission of it. This admission is conclusive evidence of the fact admitted. It is therefore immaterial, so far as the company are concerned, whether the court erred or not in its admission or rejection of evidence, in respect to an admitted fact. In *Mulford v. Estrudillo*, 32 Id. 131, Rhodes, J., in delivering the decision, says: Where the ultimate fact is admitted on the record, probative facts tending to establish, modify, or overcome it, are not the proper subjects for judicial action. In the case of *Green v. Covillaud*, 10 Id. 317, it is said: We have not overlooked the fact that in this case the decree was rendered upon proofs which seek, in important respects, to vary the case made by the pleadings; but this is immaterial. A plaintiff's case can not be better as proved than it is as stated. It is a cardinal rule in equity, as in all other pleadings, that the *allegata* and *probata* must agree, and that averments material to the case, omitted from the pleading, can not be supplied by the evidence.

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Numerous other authorities might be cited, but it is unnecessary. Indeed, the only excuse for reference to any is that I understand the chief justice to dissent from the majority of the court upon the question now under consideration, and to hold that because some evidence was given on the trial (but whether voluntary on the part of the witness or not, does not appear), which might have been applicable to an issue concerning the sale and delivery of the goods, the instructions were correct; but the majority of the court are of the opinion that the case was not tried upon the idea or theory that the answer presented an issue upon the question of sale and delivery, but that it was understood by the parties that the question of partnership was the only one made by the pleadings, and the sole issue to be tried. But, whatever might have been the views of the parties, we hold that the issue of partnership is the only one in the case, and that, if that question is decided in the affirmative the plaintiffs will then be entitled to a verdict and judgment as demanded, and that any evidence directed to the admitted fact, is irrelevant. That facts admitted can not be questioned, disputed, or varied by evidence.

If the case was to be finally disposed of by the judgment of this court on this appeal, it would not be necessary to consider the remaining question of error in law in rejecting testimony offered, but as a new trial is to be awarded, it is better to decide upon that assignment of error now, for the direction of the district court upon the new trial.

The allegation of partnership being denied, the burden of proving it by such competent evidence as is accessible to them devolves upon the plaintiffs, but the fact being peculiarly within the knowledge of the defendant, it being less known to the plaintiff than to the defendant, slight proof on the part of the plaintiff is sufficient. It is sufficient for them to show that the deceased, Thompson, and defendant acted as partners, that they participated in the profits of the saloon business; that they had a community of interest in the property and profits. It is not necessary that the evidence should bear directly upon the issue. It is admis-

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sible if it tends to prove it, or constitutes a link in the chain of proof, or is capable of affording an inference as to the fact of partnership. After examining the rejected testimony in the light of the foregoing rules, we are constrained to the opinion that the court erred in rejecting the testimony offered except the answer of Lillienthal to question No. 7 contained in his deposition.

The judgment and order refusing a new trial are reversed and a new trial ordered.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

JANUARY TERM, 1878.

PRESENT:

HON. M. E. HOLLISTER, CHIEF JUSTICE.
HON. JOHN CLARK, } JUSTICES.
HON. H. E. PRICKETT, }

THE PEOPLE, RESPONDENTS, *v.* FLORA BUCHANAN,
APPELLANT.

INDICTMENT—CRIMINAL LAW—SURPLUSAGE.—If an indictment conclude with “*contra formam statuti*,” and no statute exist concerning the offense charged, yet if the facts alleged constitute a common law offense, and the same be charged with certainty, the conclusion of the indictment will be treated as surplusage, and the indictment be held good.

JUDICIAL KNOWLEDGE—ORDINANCES.—Courts will not take judicial knowledge of city ordinances; they must be proved by the record, or by certified copies thereof.

INSTRUCTIONS.—If the defendant ask the court to give certain instructions prepared by him, and the same contain the law of the case, but so mixed with erroneous matter that they are calculated to mislead the jury, it is not error for the court to refuse the whole.

APPEAL from the second judicial district, Ada county.

Alanson Smith and E. J. Curtis, for the appellant.

F. E. Ensign, district attorney, for the respondents.

Opinion of the Court—Clark, J.

CLARK, J., delivered the opinion, HOLLISTER, C. J., concurring specially in the judgment. PRICKETT, J., concurred.

This cause comes to this court from the second judicial district of this territory for Ada county. The indictment herein was filed on the twenty-second day of March, 1877, and charges that the said "Flora Buchanan on the thirteenth day of January, 1877, and at divers other days and times between that day and the day of finding the indictment, in the county of Ada, and territory of Idaho, and within the corporate limits of Boise city—to wit, on Idaho street in said Boise city, willfully and unlawfully did keep a bawdy-house, then and there resorted to for the purpose of public prostitution and lewdness." On the twenty-seventh of March, 1877, a demurrer by said appellant was filed, setting forth as grounds of demurrer:

1. That the grand jury, by which the indictment was found, had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of the court. That the court has no jurisdiction in this action, in this: that the indictment was drawn under, and by virtue of an act of the legislative assembly of Idaho territory, entitled "an act relating to houses of ill-fame in Boise city," approved January 12, 1877, which act gives power and authority to the mayor and common council of Boise city, Ada county, Idaho territory, to regulate, fix the location of, or abolish all bawdy-houses, houses of ill-fame, or houses kept for the purposes of prostitution within the limits of Boise city, did pass an ordinance, of which the following is a copy:

"ORDINANCE No. 31.

"The mayor and common council of Boise city do ordain:

"Section 1. That it shall not be lawful for any person to keep a bawdy-house, house of ill-fame, or house kept for the purposes of prostitution, within the corporate limits of Boise city.

"Sec. 2. Any person convicted of keeping a bawdy-house, house of ill-fame, or house for the purposes of prostitution, within the limits of Boise city after the passage of this

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ordinance, shall be fined in any sum not less than one hundred dollars, or imprisonment in the county jail not less than six months, or by both such fine and imprisonment, together with costs of suit.

“Sec. 3. This ordinance to take effect and be in force from and after its approval by the mayor.

“Approved March 12, 1877.

“T. E. LOGAN, Mayor.”

That under said act and said ordinance, the city magistrate courts, or justice of the peace courts, designated as such, alone have jurisdiction to try offenses committed in violation of said act or ordinance.

2. That it does not substantially conform to the requirements of sections 233 and 234.

3. That more than one offense has been charged in the indictment.

4. That the indictment is not direct, specific, and certain, and is not in the language of the act or ordinance above referred to.

5. That the facts stated do not constitute a public offense.

6. That the legislative assembly of the territory of Idaho had no power or authority to pass the act entitled “an act relating to houses of ill-fame in Boise city,” approved January 12, 1877, under which the said indictment was drawn; that said act grants to Boise city a special charter or privilege, confers special powers and privileges not granted to all the cities of the same class within the territory; all of which is expressly prohibited by section 1889 of the revised statutes of the United States.

On the hearing the demurrer was overruled by the court.

Section 285 of the criminal practice act provides as follows: “The defendant may demur to the indictment when it shall appear upon the face thereof either: 1. That the grand jury, by which it was found, had no legal authority to inquire into the offense charged by reason of its not being within the local jurisdiction of the court. 2. That it does not substantially conform to the requirements of sections 233 and 234. 3. That more than one offense has been charged in the indictment. 4. That the facts stated do not

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constitute a public offense. 5. That the indictment contains any matter, which, if true, would constitute a legal justification or excuse of the offense charged, or other bar to the prosecution."

It is claimed in and by the first ground of demurrer that the court has no jurisdiction in this action, by reason of the act relating to houses of ill-fame in Boise city, approved January 12, 1877, which gives the power and authority to the mayor and common council of said city to regulate, fix the location of, or abolish, all bawdy-houses within the limits of Boise city, and also by reason of an alleged ordinance specified and set forth in said ground of demurrer, abolishing bawdy-houses within the limits of said city.

Courts will, judicially, take notice of the public and private acts of legislatures, and assume them to be true; such, however, is not the rule in regard to city ordinances; they must be proved either by the record, or by a certified copy thereof. (1 Greenl. on Ev. 484.) Hence, the ordinance might have been shown on the trial as evidence touching the jurisdiction of the court to hear and determine this action, but could not be considered on the determination of the demurrer.

The second ground of demurrer states that the indictment does not substantially conform to sections 233 and 234. Section 233 of the criminal practice act is as follows: "Section 233. The indictment shall contain the title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties; a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is meant."

An examination of the indictment discloses that it is entitled as follows: "The people of the United States in the territory of Idaho, against Flora Buchanan. In the district court of the second judicial district, in the county of Ada and territory of Idaho. March term, 1877." The indorsements on the indictment show: 1. The title of the action; next, indictment for misdemeanor. "A true bill. A. Rossi, foreman of the grand jury. Presented and filed in open

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court, in presence of the grand jury, March 22, A. D. 1877. A. L. Richardson, clerk district court. By E. A. Hollister, deputy."

The indictment charges that the said "Flora Buchanan, on the thirteenth day of January, 1877, and at divers other days and times between that day and the day of finding this indictment, in the county of Ada and territory of Idaho, and within the corporate limits of Boise city, to wit, on Idaho street in said Boise city, willfully and unlawfully did keep a bawdy-house then and there resorted to for the purposes of public prostitution." It is clear that this indictment charges the defendant with keeping a bawdy-house within the corporate limits of Boise city, in this county and territory, and that such offense is stated in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is meant. Section 234 gives a form for the indictment, which is substantially followed herein. The third ground alleges that more than one offense has been charged. We find nothing in the indictment to warrant this allegation. The fourth ground is equally untenable, because it is hereinbefore shown that a city ordinance must be proved on the trial, and can not be used on demurrer.

The fifth ground alleges that the facts stated in the indictment do not constitute a public offense. In this action it is claimed that the common law is repealed by the act of the legislature, approved January 12, 1877, and hereinbefore set forth. This act delegates to the mayor and council of Boise city full power and authority to regulate or abolish bawdy-houses within the limits of Boise city; yet before this act can operate as a repeal of the common law on the same subject, it must further appear that the mayor and council of said city had accepted such power and authority by the passage of an ordinance or by-law under it, which fact does not appear in the transcript in such manner or form as to entitle it to notice in the review of this case. Therefore we hold that this indictment is good at common law even though it conclude with the words "contrary to the form of the statute in such cases made and provided."

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(1 Archb. Crim. Pr. and Pl. 307, and authorities therein cited; 1 Bish. Crim. Pro., sec. 349, and cases therein cited.)

It is unnecessary to review the sixth ground of demurrer for the reason that we hold the indictment good at common law. The court committed no error in its refusal to sustain the demurrer.

On the day of filing the demurrer the defendant also filed a motion to set aside the indictment on the ground that it was not found by and presented in the presence of a legal grand jury as prescribed and directed by the criminal practice and the jury law, to wit, A grand jury composed of sixteen members, but that said indictment was found by, and presented in the presence of a less number than sixteen members.

Section 274 of the criminal practice provides that "the indictment shall be set aside by the court in which the defendant is arraigned, and upon his motion in either of the following cases: 1. When it is not found, indorsed, and presented as prescribed in this act. 2. When the names of the witnesses examined before the grand jury, or whose depositions may have been read before them are not inserted at the foot of the indictment or indorsed thereon. 3. When any person is permitted to be present during the session of the grand jury while the charge embraced in the indictment is under consideration, except as provided in section 212."

Section 225 of the criminal practice act provides: "An indictment can not be found without the concurrence of at least twelve grand jurors; when so found it shall be indorsed a true bill, and the indorsement shall be signed by the foreman of the grand jury."

The indictment shows that the several sections herein referred to and covering the grounds of this motion have been fully complied with. It is true that the indictment accuses the defendant of the crime of misdemeanor; this mode of charging the offense is not error.

Section 234, giving form of indictment, contains among other things, the following: "A. B. is accused by the grand jury of the county of ——— by this indictment of the crime

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of (giving its legal appellation, such as murder, arson, manslaughter, or the like, or designating it as felony, or misdemeanor), committed as follows.”

The transcript does not show the number of persons who composed the grand jury, only so far as the indictment discloses it by its indorsements, to wit, “A true bill. A. Rossi, foreman of the grand jury.” “Presented and filed in open court in presence of the grand jury.” These indorsements, nothing appearing to the contrary, are sufficient to warrant the conclusion that the indictment was found by and presented in the presence of a legal grand jury, as prescribed and directed by statute, therefore the motion was properly denied. The record shows that the defendant was duly arraigned, and thereon entered her plea of not guilty, and that afterwards she was tried before the court and a jury of twelve persons, and a verdict of guilty was duly rendered. Before sentence was pronounced the defendant filed a motion in arrest of judgment. The grounds upon which this motion may be made, under the statute, are identical with those for which a demurrer will lie, and having been fully considered on the hearing of the demurrer and overruled, it was right and proper to overrule this motion.

The defendant moved the court for a new trial on the grounds that the court erred on the trial in allowing the following questions to be asked the witnesses for the prosecution: “What was the general reputation of the house resided in by the defendant?” and erred in receiving in evidence the answers thereto, which were that “the general reputation of the house of defendant was that of a bawdy-house.” 2. That the court erred in refusing to give the following instruction asked by defendant: “If the jury believe from the evidence that the defendant is simply a woman of loose morals herself, and lives alone, and admits one man or many to illicit intercourse with her, she does not keep a bawdy-house, for more women than one must live or resort together to make such a house, and whatever be the reputation of the house in which she resides, if it is a proven or admitted fact that that the defendant lives alone, no other

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woman residing, or living in, or resorting to, the same house, the jury will find the defendant not guilty.”

That the evidence was that defendant resided alone, no other woman or women residing with her or frequenting the house. That J. D. Agnew, J. M. Martin, and Still Kelly, for the prosecution, and Flora Buchanan and H. H. Lamkin, for defendant, testified that the defendant lived alone; that no other woman or women resided with her, or resorted to the house of defendant for the purpose of prostitution.

We have examined the authorities covering the errors complained of, and are of the opinion that the weight of authority is to the effect that the reputation of the house, as a house of ill-fame, might be given in evidence, and moreover, might be submitted to the jury as sufficient evidence on which to convict the defendant if they chose, without having particular facts, such as men and women meeting together for the purpose of illicit intercourse.

It is believed to be the generally-received doctrine, that the characters of all the women, and, indeed, of the men, who dwell in or frequent the house, may in these cases be shown by reputation; character, indeed, is a thing of reputation, and is not to be shown by particular instances of bad conduct, but by evidence of what is generally said of the person. (1 Bish. Crim. Pro., secs. 89, 90; 1 Greenl. Ev. 53.)

On the trial of an indictment for keeping a house of ill-fame, evidence of the general character for chastity of women frequenting the house is admissible. (*Commonwealth v. Garnet*, 1 Allen, 7; *Clementine v. State*, 14 Mo. 112; *State v. McLowel Dudley*, S. C. 346.)

The only remaining ground of error for our consideration, is the refusal of the court to instruct the jury as follows: “If the jury believe, from the evidence, that the defendant is simply a woman of loose morals herself, and lives alone and admits one man or many to illicit intercourse with her, she does not keep a bawdy-house; for more women than one must live or resort together to make such a house, and whatever be the reputation of the house in which she resides, if it is a proven or admitted fact that the defendant

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lives alone, no other women residing or living in or resorting to the same house, the jury will find the defendant not guilty."

The foregoing instruction is in part correct, and in part erroneous, and the erroneous matter is so mixed with that which is law, that the whole, taken together, was calculated to mislead the jury. Among other things asked for in the foregoing instructions, defendant asks the court to instruct that more women than one must live or resort together to make such a house. This is not the law, and is calculated to destroy the effect of all that preceded it. The court, therefore, wisely rejected the whole instruction.

A bawdy-house is defined to be a house of ill-fame, kept for the resort and convenience of lewd people of both sexes. The residence of an unchaste woman, a simple prostitute, does not become a bawdy-house, because she may habitually admit one or many men to an illicit cohabitation with her. The common law did not undertake the corrections in such cases, but left the parties to spiritual supervision and penances. (*State v. Evans*, 5 Ired. N. C. 603.) But although a person be only a lodger and have but a single room, yet if she make use of it to accommodate people in the way of a bawdy-house, it will be a keeping of a bawdy-house as much as if she had a whole house. (*Rex v. Pier-son*, 2 Lord Raym; 1191; 1 Salk. 382.)

The judgment made and entered in this case is faulty in many particulars. 1. It does not show the particular offense of which she was convicted. 2. It does not fix the extent of punishment. 3. She is committed until both fine and costs be paid.

The judgment ought to have been substantially in the following form: Now, therefore, the defendant having been convicted of a misdemeanor, in keeping a bawdy-house, it is hereby considered and adjudged, that the defendant, Flora Buchanan, do pay a fine of one hundred and ten dollars, or in default of such payment, that she be imprisoned in the county jail of Ada county for a period not exceeding fifty-five days. It is further adjudged that the said defend-

Opinion of Hollister, C. J., concurring.

ant, Flora Buchanan, pay the costs of this prosecution to be taxed, and that execution issue therefor.

It is therefore ordered that this cause be remanded, and that the judgment thereon be reformed in accordance with this opinion.

HOLLISTER, C. J. I concur in the judgment of the court, but in some of the views expressed by the majority as to the construction of the act of the legislature passed January 12, 1877, entitled, "An act relating to houses of ill-fame in Boise city," I find myself unable to agree with the majority. In my dissenting opinion in the case of *Ah Ho v. The People etc.*, decided at the present term, I have gone pretty fully over the grounds, upon which I differ with the majority in this case, and I do not deem it necessary to repeat what I have already said.

It is sufficient for my present purpose to say, that until the corporation of Boise city have done some act under the power conferred by section 1 of the act referred to, which is inconsistent with the common law, the latter is not repealed. If they, as is claimed, have passed an ordinance suppressing bawdy-houses within the city limits, and prescribed a punishment for its violation, or should they hereafter do so, still the common law is in force, and a person may be punished as at common law, and also under the ordinance. The act is not limited in its operation in any portion of the city until such limitation is fixed by a by-law making bawdy-houses lawful within the city, or some portions thereof. If the corporation shall fix the location where such houses may be kept, in such portions, the statute becomes inoperative, but only to that extent; but when the by-law does no more than does the common law in relation to the subject, it is to be considered only as an affirmation of the latter, and the remedy given by the by-law merely cumulative. See authorities quoted in my dissenting opinion referred to above.

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THE PEOPLE, RESPONDENTS, v. AH HO (A CHINESE WOMAN), APPELLANT.

HOUSES OF ILL-FAME—STATUTE RELATING TO.—The statute relating to houses of ill-fame in Boise city, approved January 12, 1877, delegates power to the common council of Boise city to make any ordinance on that subject; but does not directly create an offense.

BAWDY-HOUSE—RESIDING IN.—The residing in a bawdy-house is not an offense against any statute of the territory, nor is it an offense at common law.

APPEAL from the second judicial district, Ada county.

Albert Heed, for the appellant.

F. E. Ensign, district attorney, for the respondents.

PRICKETT, J., delivered the opinion, CLARK, J., concurring, HOLLISTER, C. J., dissenting.

The defendant was indicted at the March term of said court, 1877, for having, “on the thirteenth day of January, 1877, and at divers other days and times between that day and the finding of the indictment, in the county of Ada and territory of Idaho, and within the corporate limits of Boise city, to wit: on Idaho street in said city, willfully and unlawfully” resided in a bawdy-house then and there resorted to for purposes of prostitution, etc.

The defendant demurred to the indictment on the grounds: 1. That it does not substantially conform to the requirements of sections 233 and 234 of the criminal practice act; and 2. That the facts stated do not constitute a public offense. The demurrer being overruled, the defendant pleaded “not guilty,” and was tried at that term of the district court; which trial resulted in a verdict of “guilty,” after which the defendant moved in arrest of judgment; the motion was overruled and a judgment rendered upon the verdict, from which judgment the defendant appeals to this court.

The defendant assigns several errors, but we have only found it necessary to consider the objection to the indictment raised by the demurrer, viz.: “That the facts stated do not constitute a public offense.”

To support this indictment we are referred to an act of

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the ninth section of the legislature, approved January 12, 1877, entitled, "an act relating to houses of ill-fame in Boise city," the first section of which provides: "That the mayor and common council of Boise city, Ada county, Idaho territory, are hereby authorized and empowered to regulate, fix the location of, or abolish, all bawdy-houses, houses of ill-fame, or houses kept for purposes of prostitution situated or kept within the corporate limits of said Boise city."

Section 2 of the act is as follows: "That any person occupying, residing in, or keeping a bawdy-house, house of ill-fame, a house kept for the purposes of prostitution, within any part of the corporate limits of said Boise city, other than that prescribed by ordinance of the mayor and common council of said city, shall be guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than one hundred dollars, or imprisoned in the county jail not less than six months, or by both such fine and imprisonment, together with costs of suit." Section 3 prescribes a rule of evidence in cases prosecuted under the act.

In the case of *The People v. Flora Buchanan*, heard and decided at this term, we have had occasion to construe this statute, the defendant in that case having been indicted under the same act for keeping a bawdy-house in Boise city. In that case it is decided, in effect, that the act of the legislature does not, itself, create any offense, but that it delegates the authority to the mayor and common council to create the offense therein named by ordinance.

It may be admitted that if section 2 of the act stood by itself, the views of the prosecution, that the statute created the offense, independent of any action of the corporate authorities of Boise city, would be reasonable; but in construing a statute or any section or portion of it, the whole must be considered; the different parts reflect light on each other; and, if possible, such a construction is to be made as will avoid any contradiction or inconsistency. So in Massachusetts it has been decided that in putting a construction upon any statute every part shall be regarded; and it shall be so expounded, if practicable, as to give some

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effect to every part of it. (*Commonwealth v. Alger*, 7 Cush. 53.) So again, in Michigan it has been held a cardinal rule that in the construction of a statute, effect is to be given, if possible to every clause and section of it; and it is the duty of courts, as far as practicable, so to reconcile the different provisions as to make the whole act consistent and harmonious. (2 Mich. 138.)

If we give the construction contended for to section 2 of the act, then there is none to be given to that part of section 1, which authorizes the mayor and common council to abolish all bawdy-houses, etc., situated or kept within the limits of Boise city. It is hardly reasonable to infer that the legislature intended first to confer the authority upon the common council in section 1, and then to exercise the identical power thus delegated, by abolishing the nuisances themselves in section 2 of the same act. We think that a more sensible construction of these two sections will be to hold that section 1 is, in effect, an amendment of the city charter of Boise city, authorizing the mayor and common council to do the acts therein named, and that section 2 merely provides for the punishment of violations of such ordinances when the same shall have been passed. But it is claimed that the amount of fine which may be imposed under section 2 of the act is in excess of the jurisdiction of a justice of the peace acting as a city magistrate, and, therefore, that the jurisdiction must be in the district court to indict, and punish for violations of the law. Having decided that the offense is not created by the statute, it is sufficient to say that the district court has no original jurisdiction to indict for offenses against ordinances or by-laws of cities, but only for public offenses, which are those committed against public laws. The municipal court has exclusive original jurisdiction to try offenses against the city ordinances, and as the law under consideration provides that the fine shall not be less than one hundred dollars, and the jurisdiction of that court does not exceed that sum, the legislature has, in effect, imposed a fine of one hundred dollars for violations of the ordinance, when passed.

We are, furthermore, constrained to the foregoing con-

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struction of the statute in question from the object evidently intended to be attained by the legislature. To remedy the evils of the common law by permitting the mayor and common council to create a new offense, that of living or residing in a bawdy-house, which is not recognized as an offense at common law; to advance the remedy by placing jurisdiction in the hands of a court always open, as well as to impose the burden of local government upon the municipality of Boise city, if it should see fit to accept and act under the delegated authority, were, no doubt, the motives which prompted the legislature in passing the statute.

The allegation made against the defendant in the indictment in this case, that of living in a bawdy-house, not constituting an offense at common law, and there being no public statute of this territory prohibiting it, the indictment does not contain facts sufficient to constitute a public offense, nor to support a judgment.

The judgment of the district court is, therefore, reversed.

**J. B. EMERY ET AL., APPELLANTS, v. M. T. LANGLEY,
RESPONDENT. /**

TENDER—WAIVER OF.—A tender of cattle upon a contract, within the time specified, is waived by a subsequent acceptance of them upon the contract.

INSTRUCTION—EXCEPTIONS—RECORD.—An instruction, not excepted to, in a civil case, is not properly a part of the record, and can not be reviewed upon an appeal.

ORDERS AFTER JUDGMENT—APPEAL—PRACTICE.—An order refusing to retax costs, if made after the rendition and entry of final judgment, can only be reviewed upon an appeal from the order.

JUDGMENT FOR GOLD COIN.—A gold-coin judgment is not erroneous when the question is in issue whether an oral contract required payment in gold coin or currency.

APPEAL from the second judicial district, Ada county.

Huston & Gray, for the appellants.

Brumback & Cahalan, for the respondent.

Opinion of the Court—Prickett, J.

PRICKETT, J., delivered the opinion. HOLLISTER, C. J., and CLARK, J., concurred.

This action was brought to recover a balance of one hundred and seventy dollars and ninety-one cents in gold coin, on a sale by plaintiffs to defendant of a span of horses, a wagon, and set of harness. Also, eight dollars and fifty cents on account for goods sold.

The defendant admits the purchase of the horses, wagon, and harness, but denies that the agreement was to pay in gold coin therefor, or that he agreed to pay the full sum charged therefor by the plaintiffs. He alleges that at the time of the contract it was agreed that he should pay for the property purchased, in cattle, at the price of beef cattle in Placerville and Idaho city, in March, 1875, which he alleges to have been eight cents per pound. That in March, 1875, he offered to deliver the cattle to plaintiffs, who then refused to receive them, but afterwards, about August 1, 1875, did receive nine head of cattle on said contract. Other matters of set-off, overbalancing plaintiffs' claim, are alleged in the answer, and the defendant prays a currency judgment in his favor for one hundred and four dollars and twenty-three cents. The cause was tried by a jury, and a verdict and judgment of twenty-seven dollars and twenty-nine cents in coin, with costs, was rendered for defendant. A motion for a new trial was made and overruled, and plaintiffs appealed from the order and from the judgment.

The appellants claim that the evidence will not support the verdict in favor of the defendant upon his own statement of the facts, because it does not show a tender of the cattle at the time and place that he alleges in his answer they were to be delivered, or at all. It is quite immaterial whether there was any legal tender of the cattle or not, if, as is alleged in the answer, the plaintiffs afterwards accepted and received them on the contract. The plaintiffs, by such acceptance, entirely waived the failure by defendant to perform that condition of the contract. There is sufficient evidence to support the verdict on the ground of a subsequent receiving of the cattle by the plaintiffs, and it was for

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the jury to determine from the evidence, whether they were so received at the contract price alleged, or at the market value.

The appellants allege error in one of the instructions given by the court, on behalf of the defendant, to the jury, but as no exception was taken to the instruction in the district court, it is not the subject of review in this court.

The judgment is alleged to be erroneous, because it is for gold coin; whereas the defendant, in his answer, claims a currency judgment. The question, however, as to whether the balance, which might be found due to either of the parties, was so due in gold coin or currency, was fairly put in issue by the pleadings, and it was proper for the jury to determine in what kind of money the contract required such balance to be paid. The appellants further assign as error the refusal of the judge of the court below to entertain a motion for the retaxation of costs. The order sustaining an objection to such taxation was made more than two months subsequent to the rendition of the judgment, and can not be reviewed upon an appeal from the judgment. Only "intermediate" orders can be thus reviewed.

The order complained of is "a special order made after final judgment," and such orders can only be reviewed here upon an appeal from the order itself.

The judgment and order refusing a new trial are each affirmed.

J. Q. SHIRLEY, RESPONDENT, v. F. NODINE ET AL.,
APPELLANTS.

PLACE OF TRIAL—VENUE.—The convenience of witnesses residing in a neighboring state will not entitle a party to a change of the place of trial.

IDEM—PRACTICE.—An affidavit stating that a party believes the convenience of witnesses will be promoted by a change of the place of trial, is not sufficient without showing upon what grounds such belief is founded.

IDEM.—The mere statement, in an affidavit, of a belief that the witness residing in an adjoining state will voluntarily attend, is not sufficient to entitle a party to a change of the place of trial.

APPEAL from the third judicial district, Oneida county.

Opinion of the Court—Hollister, C. J.

F. E. Ensign, for the appellants.

Huston & Gray, for the respondent.

HOLLISTER, C. J., delivered the opinion; CLARK, J., and PRICKETT, J., concurring.

This is an action commenced by the respondents against the appellants in the district court of Oneida county; and at the June term, 1877, thereof, the appellants filed their motion for a change of venue to the county of Ada, on the ground that the convenience of witnesses and the ends of justice would thereby be promoted. The affidavit of Mr. Nodine, which was filed in support of the motion, after stating the facts which are expected to be proved and the names of witnesses, shows that all the witnesses reside in the state of Oregon, and also if the trial of the action can be changed to Ada county, the affiant believes the attendance of the witnesses can be procured at the trial. The court overruled the motion for a change of venue, and it is from this order that the appeal is taken.

A motion of this character is always addressed to the sound discretion of the court, and it is only in cases which clearly show that this discretion has been abused that the decision of the court will be interfered with. It is evident from the showing made to the district court that all the witnesses, whose convenience, it is alleged, the change of the place of trial will promote, reside beyond the jurisdiction of the court, in an adjoining state, and that their attendance can not be compelled by its process. The mere fact that the party moving for the change believes that the witnesses will voluntarily attend, is not sufficient, without stating on what grounds the belief is founded. This court can not act upon the mere belief or opinion of a party, but it must be put in possession of facts by which it can determine that such belief or opinion is supported by them. Had the affidavit stated that the witnesses had promised to attend the trial, if a change had been ordered to Ada county, it would have presented a case which might have entitled the party to the order. Though in such a case the supreme court of the state of New York (6 Wend. 541) has decided otherwise,

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the same court, in 4 Cow. 532, say: "We do not remember its ever having been held, that the fact of witnesses residing in a neighboring state is to weigh with us in fixing the venue."

The appellants can have their commission to examine all their witnesses, and the retention of the venue can in no wise work to their injury.

The order of the district court is affirmed.

THE PEOPLE, RESPONDENTS, v. AH HOP ET AL.,
APPELLANTS.

CRIMINAL LAW—ARRAIGNMENT—RECORD.—It is not necessary for the record on appeal to show an arraignment. The fact of an arraignment is not necessarily a part of the record.

IDEM—INDICTMENT—ACCESSARIES.—An indictment charging five persons with murder in one count, and four of the same persons with being accessaries before the fact in another count, does not charge two offenses.

IDEM—INDICTMENT—PRINCIPALS—ACCESSARIES—SURPLUSAGE.—The statute requires all persons concerned in the commission of an offense, whether as principals or accessaries before the fact, to be indicted as principals, and a second count in such indictment charging a portion of the same persons with being accessaries before the fact, is surplusage, which does not vitiate the indictment.

JURY—IRREGULARITY.—No irregularity in drawing, summoning, returning, or impaneling trial jurors is sufficient to set aside a verdict, unless injury results, nor unless the objection is made before verdict.

CRIMINAL CASES—PRESUMPTIONS.—The presumptions are in favor of the regularity of the proceedings in the district court, in criminal as well as in civil cases.

TECHNICAL DEFECTS.—This court will give judgment without regard to technical defects, which do not affect substantial rights.

WAIVER.—If a defendant does not insist upon the mere formalities of the law in the court below, he will be deemed to have waived them. It is too late to take advantage of them for the first time in this court, on appeal.

APPEAL—REVIEW—QUESTIONS OF LAW.—Upon appeal in criminal cases, the review in this court is confined to questions of law arising upon exceptions taken on the trial and errors appearing in the record. The evidence constitutes no part of the record, and it must be disregarded, except for the purpose of determining the materiality of the exceptions.

APPEAL from the second judicial district, Boise county.

Opinion of the Court—Prickett, J.

Jonas W. Brown and E. J. Curtis, for the appellants.

George Ainslie, district attorney, for the respondents.

PRICKETT, J., delivered the opinion. HOLLISTER, C. J., and CLARK, J., concurred.

The defendants were jointly indicted for the crime of murder, alleged to have been committed on the tenth day of June, 1877, by feloniously, willfully, deliberately, and with premeditation killing one John McGuinness. The indictment contains two counts; the first charging all of the defendants as principals; and the second charging the defendants Yung Sing, Ah Pong, Hong Chu, and Ah Doe, with being accessaries before the fact, in standing by and aiding, abetting, and assisting the defendant, Ah Hop, to commit the murder. The defendants Yung Sing, Ah Pong, and Hong Chu demurred to the indictment, on the ground that more than one offense is charged against them in the indictment. The demurrer being overruled, all of the defendants, except Ah Doe, who had not been arrested or found, entered the plea of not guilty, upon which they were jointly tried and convicted of murder in the second degree. Before judgment, a motion for a new trial was made upon the minutes of the court, on the grounds: 1. That the verdict is contrary to the law and the evidence; 2. Error in law occurring at the trial of the cause, in this: that the people opened and closed the argument of the cause to the jury. The motion was overruled, and the defendants sentenced.

The appeals are from the judgment and from the order denying a new trial, and the record consists of the judgment roll and a bill of exceptions. No exceptions appear to have been taken to any order, ruling, or proceeding in the court below, except the order denying a new trial.

The defendants assign as error: 1. That the record fails to show any arraignment of the defendants, or either of them. 2. That the demurrer should have been sustained, and the overruling of it was error. 3. That it does not appear that the names of eight additional trial jurors sum-

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moned, were selected in the manner required by law. 4. That it nowhere appears in the record that the indictment was read and the plea stated by the clerk to the jury after the jury were sworn to try the cause. 5. That the court erred in refusing to allow the counsel for the defense to close the argument to the jury, and in not permitting counsel to argue the cause to the jury alternately. 6. Error in refusing the defendant's motion for a new trial.

Section 445 of the criminal practice act prescribes what papers and matters shall constitute the record in criminal actions, and the arraignment or a copy of the minutes thereof is not included.

Section 475 provides what shall be transmitted to this court for review upon an appeal, viz.: "A copy of the notice of appeal and of the record." Any matters not otherwise made by statute a part of the record, must be made so by bill of exceptions, and there is nothing in the bill of exceptions in this case which shows that the court failed to arraign the defendants, and such failure is not to be presumed. Error will not be presumed in a criminal, any more than in a civil action. It must be shown by the record. (*People v. Waters, ante*, 560.)

The demurrer to the indictment was properly overruled; the point urged here is that the indictment does not conform to section 237 of the criminal practice act, because it charges all of the defendants, except Ah Hop, with two offenses. It clearly appears on the face of the indictment that the matters set forth in the different counts were intended to describe one and the same transaction and charge but one offense, which is the murder of McGuinness. Section 251 of our criminal practice act provides that "no distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degrees in cases of felony; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid or abet in its commission, though not present, shall hereafter be indicted, tried, and punished as principals." This statute has changed the rules of pleading so that it is no longer neces-

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sary to charge an accessory before the fact, as such. The second count in the indictment was therefore unnecessary and may be treated as surplusage, and it does not vitiate the indictment, which is complete without it.

The record discloses the fact that in procuring a jury to try the cause, the regular panel was exhausted, and the court ordered "that an additional *venire* for the following eight persons (naming them) be issued, returnable tomorrow at ten o'clock A. M." It does not show how the names of these persons were obtained; whether from the latest poll-lists or otherwise. This is assigned as error. Section 23 of the act concerning grand and petit jurors provides that "no irregularity in any writ of *venire facias*, or in the drawing, summoning, returning, or impaneling of grand or petit jurors, shall be sufficient to set aside a verdict, unless the party making the objection be injured by the irregularity, or unless the objection was made before returning the verdict." It is too late, even if there was irregularity in procuring the jurors, to raise this objection on appeal in this court for the first time; furthermore, the presumption is in favor of the regularity of the drawing, and nothing is shown to overcome that presumption.

It is further alleged as error "that it nowhere appears that the clerk or other person read the indictment and stated the defendant's plea to the jury, after the panel was completed and the jury sworn to try the cause." Section 354 of the criminal practice act requires this to be done in cases of felony, and provides that "in all other cases this *formality* may be dispensed with." It is here designated as a matter of form merely. Section 482 of the same act, regulating proceedings in this court on appeals, provides that "after hearing the appeal, the court shall give judgment without regard to technical errors or defects which do not affect the substantial rights of the parties." The object of reading the indictment and stating the plea to the jury is to inform them what the issues are which they are to try. It appears from the verdict rendered, specifying the character and degree of the offense of which the defendants were convicted, that the jury fully understood the

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issues in this case. We are at a loss to see in what manner the “substantial rights” of the defendants could have been prejudiced by this mere technical defect, even if it existed.

The record shows that the district attorney opened the argument of the case to the jury; that the two counsel for the defendants followed, and the district attorney closed the argument.

Section 356 of the criminal practice act provides that “if the indictment be for an offense punishable with death, the counsel on each side may argue the cause to the jury, in which case they must do so alternately.” The counsel for the defendants claim that the judgment of the district court should be reversed because the order of beginning and closing the argument prescribed by this statute was not pursued, and we are referred to the case of the *People v. Fair*, 43 Cal. 137, to support this position.

In that case, however, the defendant, through her counsel, claimed and insisted upon this statutory right of alternating and consequently closing the argument to the jury, in the district court, which refused to allow the argument to proceed in that manner, and which refusal the supreme court of California say was error. In this case, no such claim was made in the district court, and the question was raised for the first time on the motion for a new trial. The objection was made too late, and the defendants must be considered as having waived this statutory right by not claiming it upon the argument. A defendant in a criminal case is entitled to have all the formalities of the law complied with, and if anything is omitted, he is entitled to have it corrected; but if he does not insist upon any of those matters which are merely formal and do not affect his substantial rights at the proper time, he will be deemed to have waived them—he can not be permitted to take the chances of a verdict in his favor, and then failing in this, be given another trial, because of an informality which might have been avoided if it had not been passed in silence at the first trial.

Lastly, it is alleged that the district court erred in refusing a new trial, on the ground that the verdict is con-

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trary to the evidence. This presents the question whether this court, upon appeal, can review the conviction upon the merits, or whether such review is confined to questions of law alone arising upon exceptions taken at the trial or errors appearing upon the face of the record. This must depend entirely upon the statute, as the right of review is not given by the common law. The second subdivision of section 465 of the criminal practice act provides that in criminal cases the appeal to the supreme court from the district court shall be on questions of law alone. Section 418 of the act prescribes what matters may be excepted to on the trial of an indictment, and the three following sections provide what the bill of exceptions shall contain and the manner of its settlement. In section 420, the legislature has said that "the bill of exceptions shall contain only so much of the evidence as is necessary to present the question of law upon which the exceptions were taken." There is no statute authorizing or prescribing the mode of bringing up the whole of the evidence, nor any authorizing this court to review a case on appeal upon questions of fact. The statute clearly shows that the right of review embraces only such decisions of the court as were excepted to, and errors that appear in the record. Unless exceptions are taken on the trial of a cause, the testimony constitutes no part of the record, and if included in the transcript must be disregarded. If exceptions are taken, the testimony may be considered only for the purpose of determining the materiality of exceptions taken to some decision of the court. In respect to the question whether the evidence supports the verdict, the testimony might as well have been omitted, for with that this court has nothing to do. It is for the district court, in the exercise of its sound discretion, to award or refuse a new trial, on this ground, and its decision is final.

Having examined all the questions presented in the case, we have arrived at the conclusion that none of the assignments of error are well taken, and that the judgment of the district court must be affirmed.

Judgment affirmed.

Opinion of the Court—Prickett, J.

WILLIAM HARDIMAN, RESPONDENT, v. THE SOUTH
CHARIOT MINING CO., APPELLANT.

FINAL JUDGMENT—APPEAL.—A judgment entered by the clerk of the district court in vacation is a final judgment.

APPEAL—JUDGMENT BY DEFAULT.—No distinction exists, as to the right of appeal, between judgments entered by default by the clerk, and those rendered after trial upon issues joined. An appeal lies from a judgment in either case within one year after its rendition or entry.

APPEAL from the second judicial district, Owyhee county.

Brumback & Cahalan, for the appellant.

Respondent made no appearance.

PRICKETT, J., delivered the opinion. HOLLISTER, C. J., and CLARK, J., concurred.

This is an appeal from a judgment entered by the clerk of the district court of the second judicial district, in Owyhee county, in vacation, purporting to be on the default of the defendant for not answering the complaint, or in any manner appearing within the time prescribed by statute after service of summons. The case comes to this court to be reviewed upon the judgment roll, and the alleged error is that the district court had not, at the time of the entry of judgment, acquired jurisdiction of the defendant.

The complaint discloses that the defendant is a foreign corporation, doing business in Owyhee county, Idaho territory, and that the action is for the recovery of money for goods, wares, and merchandise alleged to have been sold and delivered by plaintiff to defendant.

It was held by this court, in the case of *Robbins v. Du Rell & Co.*, at the May term, 1866 (not reported), that an appeal would not lie to this court from the ministerial act of a clerk of the district court in entering a judgment by default; that such judgment was not final in the sense of the statute which allows an appeal to this court from the final judgments of the district courts; and we have considered that question for the purpose of determining whether we have jurisdiction of this appeal; and although there are some cases which support that theory, we can not discover

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any force in the reasoning upon which it is based. Judgments entered by a clerk upon default, and those rendered by a court after a trial upon issues, are equally final judgments within the meaning of the statute concerning appeals. In the one case the clerk, acting ministerially, enters a judgment under the directions of the statute; in the other the court judicially renders such judgment as is warranted by the law; they are equally the final judgments of the law and of the court in which they are rendered. There is no distinction made by the statute in this respect, and it is not the province of the courts to make any. We therefore overrule that case.

Upon examination of the judgment roll for evidence of service of the summons upon the defendant, we find that there is nothing to show that such service was had or that the district court had in any manner acquired jurisdiction of the defendant; on the contrary, the certificate of the sheriff upon the summons shows, that after diligent search and inquiry he was unable to find any agent, cashier, or secretary of the defendant within his county, thus negating the fact of jurisdiction.

That a judgment rendered without having first acquired jurisdiction over the person of the judgment debtor, is an absolute nullity, is too plain a proposition to admit of any controversy or require any argument.

The judgment of the district court is reversed with costs.

HENRY T. RAY AND FERDINAND DANGEL, RESPONDENTS, v. MARGARET RAY, D. LEVY, ET AL., APPELLANTS.

RECORD ON APPEAL.—On appeal from a judgment, without a statement or bill of exceptions, nothing belongs to the record except the judgment roll, and no question outside of the record can be considered by this court.

DAMAGES.—The word “damages” as used in the United States statutes, concerning *supersedeas* bonds on writ of error and appeal to the supreme court of the United States, includes the loss which the defendant in error or appellee may sustain by reason of not having the judgment appealed from paid or executed.

Opinion of the Court—Prickett, J.

PLEADINGS AND PROOF ON SUPERSEDEAS BONDS.—In an action upon a *superseas* bond in a case wherein the proceedings have been staid by the bond, it is not necessary to allege or prove that the action in which the bond was given, was an appealable one.

APPEAL from the second judicial district, Ada county.

A. Heed and A. Smith, for the appellants.

Brumback & Cahalan, for the respondents.

PRICKETT, J., delivered the opinion. HOLLISTER, C. J., and CLARK, J., concurred.

This is an action upon a *supersedeas* bond given by the defendant Margaret Ray as principal, and the other defendants as sureties, upon an appeal from a judgment of this court to the supreme court of the United States.

The complaint alleges in effect, that on the fifth day of June, 1873, the defendant Margaret Ray commenced an action in the district court of Ada county, against the plaintiffs in this action, in which a decree was rendered in her favor; that the plaintiffs in this action appealed from such decree to this court, which reversed the decree of the court below, and directed the cause to be remanded with instructions to the district court to dismiss the bill of complaint. That upon an appeal from the last mentioned judgment, by said Margaret Ray, to the supreme court of the United States, the bond in suit, in the sum of two thousand dollars, conditioned to pay all damages and costs, was given; that on the thirty-first day of March, 1874, the bond was approved by the chief justice of this court and was filed in the cause; that all proceedings upon the judgment were thereupon stayed until the fourteenth day of February, 1876, when, after a dismissal of the appeal by the supreme court of the United States, the district court again became possessed of the case by a remittitur from the supreme court of the territory.

That on the twenty-second day of March, 1876, final judgment in that action was rendered in the district court, dismissing the bill, and for costs amounting to four hundred and eighty-nine dollars and eighty-seven cents, which re-

mained wholly due and unpaid, and for which sum judgment was demanded against the makers of the *supersedeas* bond. The summons was served on the defendant Levy, only, and he appeared and filed a demurrer to the complaint on the grounds "that it does not state facts sufficient to constitute a cause of action, and that it is ambiguous, unintelligible, and uncertain." Afterwards, said Levy answered the complaint, admitting the execution of the obligation sued upon, and denying that it was executed for the purpose of staying proceedings in the suit in which it was given, and upon information and belief denying that such proceedings were stayed, or that said bond operated as a *supersedeas*, and alleging that Margaret Ray, the principal in said bond named, was solvent, and was the owner of a large amount of property, real and personal, in the county, and that no demand had been made upon her to pay the judgment.

On the thirtieth day of December, 1876, a jury trial being waived, the cause was tried by the court, and a judgment rendered against the defendants for the sum of four hundred and eighty-nine dollars and eighty-seven cents damages and nineteen dollars and forty-five cents costs of the suit, said judgment to be enforced against the joint property of all the defendants, and the separate property of the defendant Levy, who alone was served with the summons.

From this judgment the defendant, Levy, appeals to this court, and alleges as error: That the court below erred in overruling the demurrer to the complaint, because it does not appear in the complaint that the case in which the bond sued upon was given, was an appealable one; that it does not show that the amount in controversy in that suit exceeded one thousand dollars, the amount necessary to give the supreme court of the United States jurisdiction; that the judgment was for costs, and no memorandum was filed; and that there was no *supersedeas* or stay of proceedings in the case.

There is no settled statement or bill of exceptions in the transcript in this case, and nothing can be considered ex-

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cept the judgment-roll. This court has repeatedly decided, and now affirms, that on an appeal from a judgment, without a statement or bill of exceptions, nothing belongs to the record, except the judgment-roll, and no question outside of that record can be considered by this court. There is in the transcript a copy of what purports to be a statement on motion for a new trial, but it does not appear to have been presented to, or settled by, the court or judge who tried the case, and for the purposes of this review, it might as well have been left out.

All that we can consider on this appeal is the question, whether the complaint contains facts sufficient to constitute a cause of action, and to support the judgment. The bond upon which the action was brought, and which is made a part of the complaint, is conditioned, that if the plaintiff, Margaret Ray, "shall prosecute her said appeal to effect, and answer all costs and damages, if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue." It was argued, at the hearing, that the damages sued for were not of such character as could have been within the legal contemplation of the obligors named in the bond; that the damages which they became liable for, were those that should accrue after the execution of the bond.

The requirement of the act of congress and rules of the supreme court, in order that a writ of error or an appeal shall operate as a *supersedeas* and stay of execution, are that security be given for the whole amount of the judgment, in case of a money judgment, and "good and sufficient security" in all cases; that the plaintiff in error, or appellant, shall prosecute his writ or appeal to effect, and if he fail to make his plea good, shall answer all damages and costs. The object and legal effect of such bond is to stay the enforcement of the judgment pending the appeal; and the damages are not confined to those which may be awarded by the appellate court for the delay, or prospective damages, but include those which the appellee may sustain by reason of not having his judgment paid or enforced. In this case the plaintiffs were prevented by the *supersedeas* bond from recovering and enforcing the judgment for costs, set forth

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in the complaint, and that judgment is the measure of, or at least is included in the damages which they have sustained, as a direct result of the giving of the bond by the defendants.

The only other point that we deem it necessary to notice is, whether it should appear in the complaint that the case in which the bond was given was an appealable one. In other words, whether it was a case in which a sufficient amount was in controversy, to give the supreme court of the United States jurisdiction. The condition of the bond is that the appellant shall prosecute her appeal to effect, which means with success. It can make no difference what the reasons of her failure were. Whether it was because the supreme court determined that it had no jurisdiction, or whether her appeal was dismissed on other grounds, the condition of the bond was equally broken in either case. It would not be good law to hold that a party may avail himself of the process of a court, and then escape the responsibility and consequences of his own act on the ground that the court to which he took his case had no jurisdiction over the subject-matter in controversy. It is not necessary to allege or prove, in an action of this kind, that the case appealed was an appealable one.

The complaint in this case alleges the making and giving of the bond, its breach and the consequent damages, and is in every respect sufficient. The answer admits the execution of the bond, and does not show a performance of the condition, or a release of it, or any other matter in bar of a recovery. The court below might well have rendered judgment on the pleadings.

The judgment is affirmed.

BRUMBACK & CAHALAN, RESPONDENTS, *v.* J. B. OLDHAM & CO., APPELLANTS.

ASSIGNEE—PARTIES.—The assignee of a chose in action is in all cases the proper party to sue.

ASSIGNEE OF CHOSE IN ACTION—EQUITIES.—The assignee of a chose in action takes it subject to all equities existing at the time of the assignment.

Opinion of the Court—Clark, J.

ASSIGNMENT—CONSIDERATION.—The consideration of an assignment need not be alleged or proved.

ASSIGNEE.—The assignee of an account may bring an action upon it, in his own name, though the assignor retain an interest in it.

CHAMPERTY—PLEADING.—Unless champerty be alleged in the pleadings, it can not be considered.

APPEAL from the second judicial district, Ada county.

Huston & Gray, for the appellants.

Brumback & Cahalan, for the respondents.

CLARK, J., delivered the opinion. HOLLISTER, C. J., and PRICKETT, J., concurred.

The plaintiffs, Brumback & Calahan, commenced an action against the above-named J. B. Oldham & Co., upon several choses in action, to wit, book accounts which had been assigned to them, in writing, by the several owners thereof. The defendants answered to the complaint, and admit that plaintiffs' assignors respectively sold and delivered to the defendants the goods, wares, and merchandise mentioned in the complaint, and admit the several amounts claimed were then due and owing, except the claim assigned by the Consolidated Tobacco Co., to which they deny being indebted in any greater sum than two hundred and one dollars and fifty-seven cents, which sum they admit to be now due.

The defendants, on information and belief, deny that for a valuable consideration, or any consideration at all, the several assignors mentioned in the complaint sold, assigned, and transferred to the plaintiffs, under their firm name, or in any manner, their accounts, or any of them, for the goods, wares, etc., mentioned in the complaint. Defendants allege that the plaintiffs are not the owners of the accounts mentioned in the complaint, and are not the real parties in interest, but that the plaintiffs' assignors are the real parties in interest.

Section 4 of the revised statutes provides that every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act.

Sec. 5. In case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense, existing at the time of, or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith, and upon good consideration, before due. Choses in action may be assigned. (*Walling v. Miller*, 15 Cal. 38; *Walson v. Hunkin*, 13 Iowa, 547; *Dobyns v. McGovern*, 15 Mo. 662.) The assignee of a chose in action is in all cases the proper party to sue. (Swan's Ohio Pl. 65.)

The object of the foregoing provisions in the code was to abolish the distinction between the former practice of courts of common law and chancery, and give full effect at law as well as in equity to assignments of rights in action, by permitting and requiring the assignee to sue in his own name. If as between assignor and assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest, whether the assignment was with or without consideration, and notwithstanding the assignee may have taken it subject to all equities between the assignor and third persons. (*Cummings v. Moore*, 25 N. Y. 627.) The defendants admit their indebtedness to the plaintiffs' assignors, and admit the assignments, but deny that any consideration passed from the plaintiffs to the assignors. It has been held uniformly in New York, Nevada, and California, and in this territory, that consideration in such cases need not be alleged or proved. (*Winters v. Rush*, 34 Cal. 136; *Martin v. Kanouse*, 2 Abb. Pr. 331; *Horner v. Wood*, 15 Barb. 372; *Moore v. Waddle*, 34 Cal. 145; *Clark v. Downing*, 1 E. D. Sm. 406.)

In Nevada it has been held that an assignee of an account may sue on it in his own name, though the assignor have an interest in it. The assignor in such case need not be made a party. (*Carpenter v. Johnston*, 1 Nev. 333.) In this case the court say: "If the assignors have any interest in the accounts assigned to Carpenter, he stands in the position of a trustee for them, and the statute

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expressly provides that an executor or administrator, trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person or persons for whose benefit the action is prosecuted." Section 6 of our practice act is the same in all respects.

The defendants by their answer admit the execution of the assignments, and no matter what the purpose was for which they were made, and admitting they were made to facilitate the collection of the several accounts, yet they are sufficient in law to enable the plaintiffs to maintain their suit.

The assignees take the interest by assignment subject to all equities and offsets which existed against the assignors at the time of the assignment. We can not see how the defendants were injured or in any manner affected by these assignments. They admit owing the debt and that it is due. They do not claim that they have paid any part of it, or that they had offsets to it. Neither do they claim that any fraud, deceit, or unfairness was practiced upon them. Defendants deny owing the full amount assigned by the Consolidated Tobacco Co. The plaintiff proved the amount of the claim assigned by the tobacco company, which was not varied or altered by any proof on the part of the defendants, and amounted to the full sum assigned to the plaintiffs by said company. The question of champerty is not raised by the pleadings, and therefore will not be considered in this case.

Judgment of the court below affirmed.

JOHN MATHISON, RESPONDENT, v. ALONZO LELAND ET AL, APPELLANTS.

UNDERTAKINGS ON APPEAL—DISMISSAL OF APPEAL.—If an appeal is taken from the judgment, and also from an order refusing a new trial, and an undertaking is given "on such appeal" without stating upon which appeal it is given, the appeals will be dismissed for want of a proper undertaking.

APPEALS—UNDERTAKINGS.—When two appeals are taken, one from the judgment, and the other from an order refusing a new trial, there should be two undertakings in order to render both appeals effectual.

Opinion of the Court—Hollister, C. J.

APPEAL from the first judicial district, Idaho county.
Motion to dismiss the appeal.

Alanson Smith, for the motion.

Huston & Gray, contra.

HOLLISTER, C. J., delivered the opinion. PRICKETT, J., concurred. CLARK, J., having been of counsel, took no part in the hearing or decision.

This is a motion by the respondent to dismiss the appeal from the order denying a motion for a new trial, and from the judgment of the court below, on the ground, among other things, of the want of sufficient undertaking. It appears from the transcript that the appeal was taken, both from the order denying the motion for a new trial and from the judgment. To render such an appeal effectual, it is necessary, under the statute, that there should be two undertakings, which may be in one or separate instruments, one on the appeal from the order and one from the judgment, so that in case of a breach, such damages may be awarded as the obligee may show himself entitled to by the judgment rendered thereon by this court.

The undertaking in this case recites that the appellants are about to appeal to the supreme court from a judgment made and entered against them in the district court in favor of the respondent, for the recovery of the possession of certain real property (naming it), and also from the order denying their motion for a new trial; and then, in consideration of the premises, and of such appeal, the obligors do severally and jointly undertake and promise, upon the part of the appellants, that they will pay all costs and damages which may be awarded against them on the appeal or dismissal thereof, not exceeding three hundred dollars. It is evident that such an undertaking covers but one appeal, and that it is impossible, upon an inspection of it, to determine to which appeal it applies.

This being the case, we must hold that neither the appeal from the order nor from the judgment is well taken, and

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that they must both be dismissed at the costs of the appellants, and that the judgment of the district court and the order of the judge refusing a new trial, be affirmed.

Appeal dismissed.

THE PEOPLE, RESPONDENTS, v. MICHAEL GOLDMAN,
APPELLANT.

KEEPING GAMING-HOUSE—GAMING.—The common law in relation to the offense of keeping gaming-houses, is superseded by the statute of the sixth session, entitled "An act relating to all games of chance."

INTERPRETATION OF STATUTES.—The maxim that *expressio unius est exclusio alterius* is to be applied to the interpretation of statutes, as well as to contracts.

APPEAL from the third judicial district, Oneida county.

Huston & Gray, for the appellant.

F. E. Ensign, district attorney, for the respondents.

PRICKETT, J., delivered the opinion; CLARK, J., concurring; HOLLISTER, C. J., dissenting.

At the July term, 1875, of the district court in and for the county of Oneida, the defendant, Michael Goldman, was indicted under the common law for keeping and maintaining a common gaming-house. The indictment charges that on the first day of December, 1874, and at divers other days and times between that day and the finding of the indictment, the defendant, for lucre and gain, unlawfully and willfully did cause and procure divers idle and evil-disposed persons to frequent and come to play together at certain unlawful games of cards, called freeze-out, draw poker, sancho pedro, and divers other unlawful games of chance, etc. The defendant demurred to the indictment, on the ground that the facts therein contained do not constitute a public offense, which demurrer was overruled by the district court, after which a trial was had, resulting in a verdict and judgment of conviction, and fine, from which judgment the appeal is taken to this court. The case comes to this court upon the judgment-roll alone, and the only ques-

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tion for determination is whether the facts stated constitute a public offense.

At common law the keeping of a common gaming-house is a public nuisance, and as such indictable; but it is claimed by the defendant that the common law, relating to that subject, was superseded by the act of the legislative assembly entitled, "An act relating to all games of chance," approved January 13, 1871, which was in force at the date of the alleged commission of the offense.

The act referred to, in its first section, provides, that a license shall be granted to any person or persons on the payment of fifty dollars per quarter for each of the following games kept, viz.: Faro, monte, E. O. or roulette, shuffle-board, or any other banking games at cards, dice, or other device; provided, that no person shall have a license for three-card or French monte, or the game called the thimble game, and those games are made unlawful. The body of the act is silent as to other games than those above named. Section 2 of the act provides for the prosecution and punishment of persons who shall keep any of said games without having first obtained a license therefor. The interpretation and effect given to this statute will be decisive of the case. It is a statute concerning the keeping of games. It is the keeping of games that is punishable as a nuisance at common law. So far as the statute relates to or regulates the keeping of the games therein named, there can be no question but that the common law is superseded; the only question is whether, by implication, the common law is abrogated as to the keeping of the games named in this indictment—whether it was the intention of the legislature to revise the whole subject-matter of keeping gaming-houses.

In construing statutes the cardinal rule is to ascertain the intention of the legislature that framed it. "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers." Again it is said: "A statute is to be construed so as to give sense and meaning to every part, and the maxim was never

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more applicable than when applied to the construction of a statute, that *expressio unius est exclusio alterius*." Applying these well-recognized rules to the statute under consideration, we conclude that when the legislature provided that certain games might be kept on being licensed, and that certain others should be unlawful, they intended that the keeping of all games not named in the act should be legalized. It would not be reasonable to attribute any other intention. If we were in doubt as to the interpretation to be given to this act, on account of any ambiguity, we might resort to the title of the act, which is, "An act relating to all games of chance," but we do not consider this necessary.

This statute having, as we hold, superseded the common law, there was no law in force, at the date mentioned in the indictment which constituted the acts, charged to have been committed by the defendants, a public offense, and it is clear, that there can be no legal conviction for an offense unless the act be contrary to law at the time it is committed.

The judgment of the district court is reversed.

WILLIAM F. SOMMERCAMP, RESPONDENT, v. JOHN
CATLOW, APPELLANT.

PLACE OF TRIAL—CHANGING VENUE.—After two jury trials without a verdict, a motion to change the place of trial should not be granted, unless it be clearly established that a fair and impartial trial could not be had in the county of defendant's residence.

COSTS ON APPEAL.—Where a party unnecessarily multiplies costs excessively, the court will protect the adverse party from payment of such excess.

APPEAL from the second judicial district, Owyhee county.

Brumback & Cahalan, for the appellant.

R. Z. Johnson and Huston & Gray, for the respondent.

CLARK, J. In this action, two trials by jury were had at the October term, 1877, of the district court of the second judicial district for Owyhee county, without finding a verdict.

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The plaintiff then moved for a change of the place of trial. On the hearing of said motion, the judge ordered that the place of trial be changed to Ada county in the same judicial district. The defendant appeals from the said order to this court.

The plaintiff's motion in the court below was based upon his own affidavit, showing substantially the following facts: 1. That the plaintiff had fully and fairly stated the facts of his case to his counsel, R. Z. Johnson, Esq., and is advised by him that it is meritorious. 2. That he believes he can not have a fair and impartial trial in Owyhee county, by reason of the interest, prejudice, and bias of the people of the said county. 3. That there have been two trials of this cause, and in both the jury failed to agree upon a verdict. 4. That there is much public excitement in regard to this action in Owyhee county, and that very many of the citizens of said county have talked about the merits of the action and expressed decided opinions thereon.

In opposition to the motion, the defendant filed and used on the hearing one hundred and one affidavits, the first of which in importance was his own affidavit, showing, substantially, the following facts:

1. That plaintiff and defendant are residents of Owyhee county, and that the cause of action set forth in the complaint and answer arose in said county.

2. That he had fully and fairly stated the facts of his defense to his counsel, and is advised by him that he has a meritorious defense.

3. That on the first trial of this cause about forty persons were summoned for the purposes of a jury, and that out of the number called upon to answer to their qualifications to sit as jurors on the trial of this action, only two or three were found disqualified on the ground of opinion, enmity, or bias.

4. That, on information and belief, defendant says, that when the jury returned into court the last time, before their discharge, they stood ten for the plaintiff and two for defendant.

5. That for the second trial about twenty-four were sum-

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moned, and that, although the action had attracted some attention in the interval, another jury was readily obtained, only two or three of those examined being found disqualified on the score of opinion, enmity, or bias.

6. That at the time the last-mentioned jury was discharged, they stood, as defendant is informed and believes, eleven for the plaintiff and one for the defendant.

7. That, although the trial attracted some attention in Silver city and vicinity, it is not true that there is much public excitement in said county concerning said action, or that, by reason of said alleged public excitement in said county, or from any other cause, the parties to said action can not have a fair and impartial trial of the action in Owyhee county.

8. That there are about three hundred and fifty persons residing at and near said Silver city, who possess the requisite qualifications to render a person competent as a juror, and that the greater portion of them, if not nearly all of them, are entirely free from any enmity, bias, or prejudice to or against either party, and could sit as jurors on the trial of said action, and fairly and impartially pass upon the issues of fact involved therein.

9. That the difficulty of reaching an agreement, on the part of the jurors, arises not from partiality, or enmity, or bias, but from the fact that on said trials the only witnesses to the facts connected with the counter-claim of the defendant, were the parties to the action; that the evidence of said parties is irreconcilably opposed.

10. The defendant's affidavit sets forth other grounds showing that he would suffer damage in case the motion was granted.

11. The remaining one hundred affidavits on behalf of the defendant are by different citizens of Owyhee county, showing that each of them is legally competent to sit as a juror on the trial of this action.

This case comes within that class of actions which must be tried in the county where the defendant resides. (Secs. 18, 19, and 20, revised laws.) The place of trial may be

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changed by the court, on motion, for any of the causes mentioned in sec. 21, revised laws.

The motion herein is made under the provisions of the second subdivision of said section 21, to wit: on the ground that an impartial trial can not be had in the county where the action was brought, by reason of the interest, prejudice, and bias of the people of said county, and the further ground of public excitement on the subject of this action. The plaintiff's affidavit for the motion fully covers the above grounds, and, for greater or other reasons why the motion should be granted, alleges that two jury trials were had, and the jurors discharged without a verdict.

The plaintiff's affidavit was the only one in support of the motion, and is opposed by the defendant's affidavit, fully and completely denying all the allegations in plaintiff's affidavit, except the two trials, and showing that the reason why the juries were unable to agree upon a verdict arose from the fact that the only witnesses to the counter-claim of the defendant were the parties to the action, and that their testimony is irreconcilably opposed. The affidavit of the defendant is in a degree supported by the affidavits of one hundred citizens of Owyhee county, showing that they are qualified to sit as jurors on the trial of the cause. The inability to obtain a fair and impartial trial must be clearly established. (*People v. Wright*, 5 How. Pr. 23.) In the *People v. Bodine*, 7 Hill, 181, the court held "that it was not enough for jurors to state their belief that a fair and impartial trial could not be had in the county, but that the facts and circumstances forming the grounds of such belief must be stated so that the court may judge for itself whether or not the allegation is well founded."

From a careful consideration of the testimony presented on the hearing of the motion, we are of opinion that the preponderance of testimony is in favor of the defendant and against the motion; the simple fact that there have been two jury trials without a verdict is not sufficient to warrant a change of the place of trial, when we consider the ease with which the former juries were obtained, and the fact that one hundred citizens have sworn to facts which render

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them legally competent to sit as jurors on the trial of this action. We are bound to consider also other facts peculiar to this case: that the parties to the action are the only witnesses to defendant's counter-claim, and that their testimony is irreconcilably opposed, and that this may be the cause why the juries have failed to find a verdict. If it be the true solution of the difficulty in agreeing upon a verdict in this cause, the same reason will prevail in whatever county the action may be tried. The irreconcilability of the testimony, and the fact that the only witnesses to the defendant's counter-claim being the parties to the action, we deem of sufficient cause to take this case out of the operation of the general rule governing like motions. The difficulty of reaching a verdict is apparent without jurors becoming obnoxious to the charge of partiality, enmity, or bias to or against either of the parties.

We are of opinion that the court erred in granting the motion.

The appellant has filed and used one hundred affidavits on this motion, showing facts which might have been fully established by the testimony of two or three persons who had first made themselves acquainted with the substantial facts set forth in each of the one hundred affidavits mentioned.

We are, therefore, of opinion that the appellant has multiplied costs to an excessive and unwarrantable degree, and that he ought to pay such excessive costs, to wit, the cost of ninety-five affidavits and the transcripts thereof.

It is adjudged that the order of the court below, changing the place of trial, be reversed and the cause remanded to Owyhee county for trial, and that the appellant recover the costs of this appeal, except the costs of ninety-five of appellant's affidavits and the transcripts thereof.

PRICKETT, J., concurred.

HOLLISTER, C. J. While I am not prepared to dissent from the judgment reversing the order granting a change of venue in this case, I deem it important to state that such a motion is addressed to the sound judicial discretion of

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the court, and that it is only in cases where such discretion has been abused that its action will be disturbed. It is often difficult to determine in what cases and to what extent this discretion has not been properly exercised, and hence it becomes important to lay down some general rule so that it may appear that the appellate court does not act arbitrarily or capriciously in overruling the action of the court below. I will content myself in this case with stating that I consider the principle well settled, that a party who seeks to question the action of a court in a matter that is addressed to its discretion, must show, by a statement of facts, that such action will be productive of injury to him, and be of no benefit to the opposite party.

The defendant states in his counter-affidavit that his business calls him to various portions of Owyhee county, and to the states of Nevada and California, and that he can not absent himself from either of said places for any considerable length of time without great inconvenience and serious moneyed loss. That he has already been greatly inconvenienced in his business by his attendance on the two trials of said action just had, and can not go into the immediate preparation for another trial and proceed to Ada county for trial at the next term of said court without great personal annoyance and seriously interrupting the course of his business, to his great damage. It is difficult to see from these statements, which at best are mere opinions, how a trial in Ada county would more seriously annoy him or injure his business than would another trial in Owyhee county. He would be obliged to absent himself from his regular business, and from Nevada and California, as much in a trial in Owyhee as in Ada county.

And from the fact, taking his statement as true, that the only witnesses to the facts connected with his counter-claim were the parties to the action, it is equally difficult to see why he could not go into the immediate preparation for another trial and proceed to Ada county without great personal annoyance and serious interruption to his business. By this showing he needed no witnesses, and the business season was brought to a close, or nearly so, and the next

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term of the Owyhee court would be at a season when business men, and especially those having business in distant states, would be more seriously incommoded by forced absence than in November, when the Ada county court convened.

These reasons, and the other, which courts always take notice of in applications of this kind, that parties acting on the defense usually work for delay, were considerations which addressed themselves to my mind in granting the change of venue.

In giving my views, I wish to lay down this proposition as a rule in cases of this kind, to wit, that as a principle of law it can not be held that a court has abused its discretion, unless it is made to appear by an explicit statement of facts that its exercise has clearly worked an injury to the party who complains of its action.

**FERDINAND DANGEL ET AL., RESPONDENTS, v. DAVIS
LEVY ET AL., APPELLANTS.**

RECORD ON APPEAL.—The record on an appeal to this court ought not to be incumbered with useless repetitions.

ERRORS WHICH DO NOT PREJUDICE.—For errors and defects in the pleadings and proceedings, which do not affect the substantial rights of the party complaining, a judgment will not be reversed.

BOND—LIABILITY.—The affixing of the sum of one thousand dollars between the signature and the seal of the obligor to a bond, the penalty of which is two thousand dollars, will not have the effect to limit his liability to one thousand dollars.

UNDERTAKING FOR INJUNCTION—JUSTIFICATION OF SURETIES.—Under our statute in a bond or undertaking for an injunction for two thousand dollars or less, a surety can not justify in a sum less than that named as a penalty in the bond or undertaking.

UNDERTAKING—ALTERATION OF—FRAUD.—When, in an undertaking for two thousand dollars, the figures one thousand dollars entered between the signature and seal of one of the sureties, were erased after it was signed by him; this was no fraud upon any other surety who signed the undertaking after the erasure.

UNDERTAKING FOR INJUNCTION—ERASURE IN.—Where an undertaking for an injunction was executed and delivered after an erasure had been made, it can not be presumed that the obligee was a party to such alteration or erasure.

INSTRUCTIONS.—The relevancy of instructions is to be determined by the evidence in the case.

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APPEAL from the second judicial district, Ada county.

Alanson Smith and Albert Heed, for the appellants.

Brumback & Cahalan, for the respondents.

HOLLISTER, C. J., delivered the opinion; CLARK, and PRICKETT, JJ., concurring.

This suit was instituted in the district court of Ada county by the respondent against the appellant, Margaret Ray and J. C. Sims, on a joint and several injunction bond executed by them, in the penal sum of two thousand dollars, in which a judgment was obtained against the appellant on the twenty-sixth day of March, 1877, for two thousand dollars and costs, there having been no service of summons upon the other defendants. From the judgment and from the order refusing a new trial, the case is brought here by appeal.

There are numerous errors assigned, for which the appellant claims that the judgment should be reversed, which we will proceed to notice in their proper order: 1. In overruling the demurrer to the complaint. 2. In holding that the complaint stated facts sufficient to constitute a cause of action. The latter specification is subdivided as follows:

1. Because there is no sufficient allegation in said complaint of plaintiff's ownership of the property alleged to have been received by the sheriff and converted to the use of the defendant Margaret Ray, and for other purposes.

2. Because there is no allegation of the insolvency of the defendant Margaret Ray, and nothing to show that plaintiff Dangel might not have recovered the value of the property so seized by the sheriff by bringing his suit therefor, after the removal of the prohibition of said plaintiff to bring his suit, by the final dissolution of the injunction.

3. Because the said plaintiff has not exhausted the remedies required to be applied before the defendant Levy could be made legally answerable upon the bond in suit.

4. Because said defendant Levy's liability as a co-surety on said bond could not attach, if at all, which is not conceded, until it was either averred or alleged in said com-

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plaint, that defendant Margaret Ray, who appears as principal in said bond set forth in plaintiff's complaint, was unable to respond in damages.

5. Because two causes of action were improperly united.

As these objections will go to the foundation of the action, we will proceed to consider them in the order in which they are taken.

First, that there is no sufficient allegation, etc. After stating the execution of the bond by the obligors, the determination of the injunction suit, and the judgment of the district court that the plaintiff Margaret Ray was not entitled to the injunction, the complaint alleges that plaintiff was damaged by the injunction in the sum of two thousand dollars, as follows: cash paid J. Brumback, attorney for plaintiff in the injunction suit, three hundred dollars; cash paid F. E. Ensign, attorney for plaintiff, in the sum of two hundred dollars; cattle sold by Margaret Ray after the service of the injunction, of the value of six hundred and sixty-five dollars, and cattle sold by William Bryon after the service of the injunction, of the value of eight hundred and thirty-five dollars, and interest on the cattle sold, two hundred dollars. It may be conceded, so far as the question thus presented is concerned, that there is no sufficient allegation of property in the cattle, in the complaint, to entitle the plaintiff to a recovery of their value; but as the plaintiff is entitled to his action for the recovery of the fees paid by him to his attorneys in the injunction suit, and which were properly alleged in the complaint, the demurrer going to the whole cause of action and not to that portion of it, it was properly overruled. Had the defendant wished to take advantage of the defect complained of, he should have demurred to the complaint because it was ambiguous or uncertain in that respect. Had this been done, the court could have required the plaintiff to amend the complaint, or precluded him from offering any proof as to the cattle.

The second reason assigned under this head is not tenable. The condition of the bond sued on, was that Margaret Ray as principal, and J. C. Sims and D. Levy as sureties,

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do jointly and severally undertake, etc., that in case the said injunction shall issue, the said plaintiff, Margaret Ray, will pay to the said Ferdinand Dangel, enjoined such damages not exceeding two thousand dollars, as such party may sustain by reason of the said injunction, if the district court finally decide that the plaintiff was not entitled thereto. The obligation to answer in damages, by the sureties on the bond, was not made to depend upon the insolvency of the principal, but it became absolute by the terms of the undertaking, when the court in which the injunction suit was pending should finally decide that the plaintiff was not entitled to the injunction.

If the principal should pay the damages, the sureties would of course be relieved from liability, but a suit against a principal is not necessary to determine the liability of the sureties.

The obligee is at liberty to bring his suit against the principal, but he is not obliged to do so, with a view to determine her insolvency, before proceeding against either of the sureties. Nor is the fact that the plaintiff could have brought suit to recover the property or the value thereof against the sheriff or other persons holding it after the prohibition was removed a sufficient ground of objection to the action. The plaintiff had his election to bring his suit for the recovery of the property or its value, against any one who had converted it to his use, after the prohibition was removed, or on the bond, and having chosen the latter, it does not lie in the mouth of the defendant to complain.

The third and fourth reasons come within the same principle. It is further claimed that the complaint is bad, because the plaintiff united two causes of action, to wit: a claim for the amount paid Brumback, and the amount paid Ensign, in the same action. It seems hardly necessary to say that the amount paid to these two attorneys, being for fees in the injunction suit, constituted but one cause of action, and was recoverable as part of the damages sustained by the injunction.

The third specification of errors is as follows: The court erred in overruling said demurrer, on the various grounds

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therein set up, other than those specifically above enumerated—reference to said demurrer being had, will more fully and at length appear—especially, that the complaint is ambiguous, unintelligible, and uncertain, and that there is a misjoinder of parties defendant.

We have disposed of the questions arising upon two of the grounds of demurrer, to wit, that several causes of action are improperly united, and that the complaint does not state facts sufficient to constitute a cause of action, and it only remains to notice, under this specification, the remaining grounds of objection set up by the demurrer. The first is that the complaint is ambiguous, unintelligible, and uncertain in this: plaintiff avers that defendants made and filed their bond in suit, and in charging defendants for cattle sold by Wm. Bryon. As it was proper for the plaintiff to sue on the injunction bond and allege as a portion of the damages for the breach thereof, that Bryon sold cattle that he was restrained from recovering by the injunction, and as the plaintiff has done this, though in not very apt terms, it must be confessed, it is difficult to see that the complaint was objectionable on this point. The demurrer, we think, on this ground, was quite as ambiguous and unintelligible as the complaint, and failed to point out very clearly any proper reason for the objection.

The second is, that there was a misjoinder of parties defendant. This general statement, under the old rules of pleading, would be bad; for it is in substance a plea in abatement, and such plea must be so pleaded as to enable the plaintiff, in a subsequent suit for the same cause, to supply the defect or avoid the mistake upon which the plea is founded, or, in other words, it must be so framed as to give the plaintiff a better suit. Under our statute, there is no ground for any such objection. The second clause of section 32, chapter 33, of the civil practice act, page 86, is as follows: If the action be against defendants, severally liable, he (the plaintiff) may proceed against the defendants served, in the same manner as if they were the only defendants. This the plaintiff has done, and we can not see that the complaint was defective in this respect.

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The fourth error complained of is, that the verdict is against the evidence in this, that the evidence shows no damage beyond the amount of about and near the sum of one thousand five hundred dollars. We have gone carefully through the testimony, and find that it shows that the property sold by the sheriff was worth, at least, eight hundred and five dollars; one cow, sold to Diesenroth, forty-five dollars; cattle, sold to Jenkins, two hundred and eighty-nine dollars; one cow, sold to Jackson, thirty dollars; two cows, sold to Davis, one hundred dollars; two cows, sold to Robbins, one hundred dollars; fees paid to Brumback & Ensign, five hundred dollars; total, one thousand eight hundred and sixty-nine dollars. To this is to be added the interest thereon from some time in June, 1873, which will bring the damages up to more than the jury awarded to the plaintiff.

The fifth error assigned is, that the verdict is against the evidence in the case, and insufficient to justify the verdict in this; 1. There was no sufficient evidence of a demand for the property alleged to have been converted. It is sufficient to say on this point that the action is upon the bond, and not an action for the recovery of the property. There is no obligation imposed upon the plaintiff to sue for the property, and as a consequence he was not put to his demand before bringing his suit upon the bond. Even were it otherwise, and had such suit been brought, no demand would have been necessary, for the possession of it by Mrs. Ray and the sheriff was tortious *ab initio* as against Dangel.

2. There was no sufficient evidence of the execution of the bond sued on on the part of the defendant D. Levy. The answer to this is, there was no denial in Levy's answer of its execution. The defendant says it was never fully executed, and then proceeds to show that he was induced to sign the bond by fraudulent representations, but by whom made it does not appear.

3. There was no evidence showing that plaintiff could not have recovered the amount sued for, or that it could not have been collected of Margaret Ray, defendant, who, as

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principal on the bond, was first liable. This question has been disposed of in the consideration given to the second specification of the second error assigned, *supra*.

4. Because the evidence shows that the plaintiff Dangel could have no title to the property in dispute, because a judgment unreversed was proven, where the title to said property was found in said defendant, Margaret Ray, at the commencement of this suit, and is still in her. On an appeal to this court from the judgment of the district court in the case of *Margaret Ray v. Henry T. Ray and Ferdinand Dangel*, which was brought to carry into effect the decree of the district court in the divorce suit of *Margaret Ray v. Henry T. Ray*, in which it was adjudged that the property in controversy was not in Dangel, or rather was in Ray and wife, this court decided that such decree was void so far as it affected the right of Dangel to the property, because he was not a party to the proceedings in the divorce suit. The fact that he took an appeal to this court from the judgment of the district court in this case did not have the effect to keep the title to the property adjudged to her in the divorce suit in Margaret Ray, until the decision in this court was had.

The judgment in this court was that she never had any title to it under the decree in the divorce suit as against Dangel, and as a consequence, she could assert none under it as against Dangel at any time. Dangel, instead of appealing the case, could have proceeded at once against her for the recovery of the cattle, and was about to do so, but was restrained by the district court. In such a proceeding the judgment of the district court in the divorce suit could not have been pleaded in bar of the action, for it was a mere nullity, and would have been so regarded had it been set up as a defense.

5. Because the evidence on the face of the bond tended to show a fraud against the defendant Levy, and the verdict is against the evidence.

It is claimed that between the signature of J. C. Sims on the bond and the seal affixed to it, there had been an erasure of the figures \$1000, after Sims had signed it,

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and that by reason thereof, such a fraud had been perpetrated as to render the bond void as to the defendant Levy. The bond, as has been observed, was a joint and several bond, the penalty of which was two thousand dollars.

The statute finds that on granting an injunction, the court or judge shall require, except where the people of the territory are a party plaintiff with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damage, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto. Upon an inspection of the bond there seemed to have been something erased at the place indicated, but what had been erased, by whom erased, and at what time, there was nothing to show. Conceding, however, that these figures had been placed there before Sims signed the bond, and had been subsequently erased, we can not conceive that this could possibly have changed the legal effect of the bond, or limited the liability of Sims to one thousand dollars. The execution of the bond being shown, the court could only look to the body of it to determine its legal character. If the bond was signed by Sims, the mere affixing these figures to his signature could not lessen his liability, because it was fixed by the terms of the bond.

The sixth, seventh, eighth, and ninth specifications under this head, to wit, that the verdict is against the evidence; that there was not sufficient evidence of the value of the property, beyond the sum of one thousand five hundred dollars; that there was not sufficient evidence to show that plaintiff was entitled to recover; and that the verdict is against the weight of evidence, have been heretofore considered, and need no further answer.

The sixth assignment of error, that is, that the court erred in overruling defendant's motion for a new trial, because, first, there was no sufficient proof of the execution of the bond by the defendant Levy, has been already considered.

The second ground of error under this assignment, to wit, because a fraud, and the facts constituting the same,

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were distinctly set out and alleged in the answer of Levy, in the procuring of his signature to the same, by which he was deceived and suffered injury, brings under consideration the answer of the defendant Levy on this point. It is as follows: That this defendant, for his further answer, avers that said undertaking was never fully executed, for that he only agreed to become surety, together with some other responsible person or persons that could justify to the full amount of two thousand dollars; that this defendant is informed and believes that the said defendant, J. C. Sims, never did justify to the sum of two thousand dollars, or in any other or greater sum than one thousand dollars, and that it was expressly understood and agreed that the said J. C. Sims could not and would not justify to more than that sum, to wit, one thousand dollars. That said undertaking was never executed in accordance with the understanding and agreement. That said justification of the said Sims was procured through mistake and fraud and misrepresentation, all of which was without the knowledge or consent of this defendant, etc.

Laying out of view entirely the question whether the facts above pleaded might be set up by way of defense, by Sims himself, in a suit brought against him upon the undertaking, we are clearly of the opinion that the answer does not show fraud against Levy. It is to be observed that injunction bonds are procured by the plaintiff in injunction suits, and not by the defendant. He has no agency in the matter, and is merely a passive instrument in the hands of the law, and is obliged to accept the bond when properly executed and approved by the judge. In this sense, he in no wise became a party to the fraud, and can not be held responsible for any false representations not made by himself, by which a party is induced to sign the bond. If, as is claimed, Sims did not justify in a greater sum than one thousand dollars, it is not pretended that the plaintiff knew this fact, or did anything to deceive the defendant. Upon the face of the bond, and by the certificate of the justice of the peace who took Sims' justification, it appears that he became responsible for the full sum of two thousand dol-

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lars. It is admitted by the defendant that he signed the bond after the pretended erasure was made, and with full knowledge of the fact, and he can not be permitted now to plead that he was deceived or defrauded thereby.

But the presumption is, that if any erasure was made, it was done with the full knowledge of Sims and the defendant, and with their consent, before the bond was submitted to the judge for his approval, and filed in the case. In all undertakings where sureties are required, where the penal sum does not exceed two thousand dollars, the sureties can not justify in a less sum than the penalty, and it must follow, that if the bond had been presented for approval, with the limited liability claimed for Sims, the judge would have required the restrictive clause to be stricken out as not conforming to the requirements of the statute.

The conclusive answer to the objection is, as has been already seen, that it was an immaterial alteration, and did not affect the validity of the bond as to any of the parties to it. This we believe disposes of all the objections raised in the assignment of errors, under this head, except those arising from the instructions given and refused, to which exceptions were taken.

It is alleged that the court erred in giving instructions 1, 2, 3, 4, and 5, for the plaintiff, but as the defendant has only taken exceptions to the first and second, these only will be considered. The first is as follows: Dangel is not affected in his rights by any process issued in the suit of *Margaret Ray v. Henry T. Ray*. He could not be made a party, by proceeding subsequent to judgment. The meaning of this instruction is somewhat obscure, but it in effect charged the jury, that the plaintiff could not be bound by the judgment or decree in the divorce suit of *Ray v. Ray*, which adjudged the property in controversy to be in Ray and wife, against the plaintiff, by a suit brought subsequently, to validate and enforce the decree in the divorce suit, in which he was not a party. There was no error in giving this instruction, for it can not be pretended that the plaintiff was or could be precluded from asserting his right to the cattle in controversy, by any judgment rendered in a

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suit to which he was not a party. Nor could his title thereto be adjudged in such suit to be in Margaret Ray and Henry T. Ray as against him.

The second instruction, to wit, if the plaintiff, Dangel, was the owner of the cattle seized by the sheriff of Ada county, and was not a party to the suit of *Margaret Ray v. Henry T. Ray*, he is entitled to recover the value of all cattle sold either by the sheriff of Ada county or Mrs. Ray, subsequent to the issuing and service of the injunction in the case of *Margaret Ray v. F. Dangel and Henry T. Ray*, excepting such as he may have subsequently obtained possession of without purchasing them, is fully sustained by the evidence in the case. It may be conceded for the purpose of this instruction, that the complaint did not allege property in the cattle sold to be in the plaintiff, but the defendant treated this question as an issue, and suffered the plaintiff, without objection, to introduce evidence of his title thereto and the value thereof, and it is too late to raise such objection, for the first time in this court, the evidence having gone to the jury; it was proper to instruct them as to the law applicable thereto. Indeed, it would have been erroneous to have refused to charge upon a question raised by the evidence. (See *Fisk v. Bailey*, 51 N. Y. 150; *Comstock v. Doyle*, 3 How. Pr. 97.)

It is urged that there was error in refusing defendant's fifth instruction, which is as follows: The plaintiff is not entitled to recover in this action for the cattle, if any, that returned to plaintiff Dangel and were retained by him, even if they had been driven away and sold, for he is only entitled to recover for actual loss and damage during the existence of the injunction.

As the plaintiff's second instruction covers the same point, it was unnecessary to repeat it, and there was no error in refusing it. The sixth instruction asked by the defendant and refused by the court is as follows: The bill of sale from Henry T. Ray to Ferdinand Dangel is only *prima facie* evidence of title, and at most conveys to the purchaser such right and title as the vendor then had to the property con-

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veyed by such bill of sale. The refusal to give this instruction, the defendant claims was erroneous.

Aside from the evidence of title contained in the bill of sale, the proof shows that the property sold by the sheriff, for the recovery of the value of which this suit is brought, was levied on as the property of Henry T. Ray, in the suit of *Margeret Ray v. Henry T. Ray*, and at the instance of the former to satisfy her costs in that suit. She treated it as his property, and under the decree of the court in that suit it was set apart to him as his share of the common property of himself and wife; but, as to the title to her share of the property, which she took by the decree of the court in the divorce suit, in addition to the bill of sale, the proof shows that her title under that decree was not valid, but that it was in Dangel, and so adjudged by this court in recovering the judgment of the district court, in the case of *Ray v. Dangel and Ray*, already referred to. That question was *res judicata*, and was no longer an open one for the consideration of the jury, and it was properly withheld from them.

The defendant's seventh instruction, which was refused, is as follows: But if the jury believe from the evidence that the title to the property in such bill of sale described, was after the execution and delivery of such bill of sale, and the property therein set forth and described, to said plaintiff Dangel by said Ray, futher adjudicated and determined by the final judgment of the court in the divorce suit of *Margaret Ray v. Henry T. Ray*, and that such remains unrepealed and unrecovered, then the title by such judgment is superior to the title by such bill of sale, and must prevail, and in such case the jury will find for the defendant. There was no error in refusing this instruction. In the first place it places the plaintiff's right to recover entirely on the question of his ownership of the property in controversy, whereas he has a right of action for the recovery of the fees paid by him to his attorneys in the injunction suit, and that it is well brought for such purpose.

In the next place the instruction is based upon the legal conclusion that the judgment awarding Margaret Ray the

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property, in a suit in which Dangel was not a party, was not void as to him, but only voidable on an appeal therefrom and a reversal thereof. This court has already determined, in the case of *Ray v. Ray and Dangel*, that such judgment was absolutely void, as to the plaintiff, and such we now hold was the case. It was not necessary that any appeal should be taken to determine that question, but that Dangel might treat it as a nullity and not binding upon him.

The defendant's eighth instruction embraces the same principle of law, and was properly refused.

The defendant's ninth instruction, which was refused, is as follows: The order made by Judge Noggle, extending the time of the process issued in the divorce suit of *Ray v. Ray*, was void and without authority of law, and any damages caused thereafter, by reason of the said order, to Dangel, can not be recovered in this action. Without stopping to consider the question whether the judge had authority to extend the life of the process, it is a sufficient answer to this objection to say that the order extending the time, by which the plaintiff sought to show his title to the property, and his damages in part, was admitted in evidence without objection from the defendant, and treated by him as legitimate evidence, and he could not thereafter be permitted to destroy its effect by the instruction asked for. Had he deemed it inadmissible, he should have objected to its introduction, or had it been inadvertently admitted, he should have moved to strike out, and if the rulings of the court had been against him, should have taken his exceptions in due form.

The tenth instruction covers substantially the same grounds, and for the same reasons was properly refused.

The eleventh instruction is as follows: If the jury believe from the evidence, that the cattle sold by Mrs. Ray were delivered to her by virtue of process issued in the divorce suit, and that they were the cattle decreed to her in that action, then the plaintiff can not recover therefor, nor the value thereof. It is unnecessary to repeat what has already been said, that Mrs. Ray took no title to the cattle mentioned by the decree of the court in the divorce suit as against Dangel.

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No. 12, to wit, if the jury believe from the evidence that the plaintiff had the same remedy to sue for and recover the cattle, after the injunction was dissolved, that he had at the time of its issuing, then he is not entitled to recover, was properly refused for these reasons: 1. It places the plaintiff's entire right to recover on the ground, that if he had no right of action for the recovery of the value of the cattle, he could not sue for the recovery of the fees paid his attorneys in the injunction suit. 2. It requires the court to charge the jury, that they may determine whether the plaintiff had the legal right to sue for the cattle, as a question of fact, whereas it is purely a question of law for the court; and 3. It denies to plaintiff the right to elect in the choice of his remedies, by action on the bond or for the recovery of the cattle or the value thereof.

Nos. 13, 14, 15, and 16 all go to one point, and may be considered together.

No. 13 is as follows: If the jury believe from the evidence that the defendant, Levy, was induced to sign the bond in suit with the express understanding that one other good and responsible surety was to sign with him as a co-surety, and that by a fraud upon him and by a deception the co-surety that appears upon said bond did not justify to the full amount of the said bond, but that through mistake of the justice of the peace, the bond shows that said J. C. Sims did regularly justify to said full amount of two thousand dollars, but that he did not do so, the plaintiff can not recover in this action. It is sufficient to say, in answer to this objection, that there was no evidence in the case, to support either of these instructions, and besides, the alteration claimed to have been made was not a material alteration, and did not effect the liability of the defendant.

Nos. 17 and 18 require the court to charge the jury that the plaintiff can not recover in this action for damages caused by the act of the sheriff in obeying the final process of the court, issued in the case of *Ray v. Ray*, to carry out the decree of the court in said cause.

The reasons for upholding the court in the refusal to so charge the jury, have been repeatedly given in the preced-

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ing portions of this opinion, and they need no further elucidation.

The only errors assigned by the appellant not already considered, which are deemed important to notice, are founded upon the refusal to admit the testimony of A. Martin, J. C. Sims, and A. Heed, offered by the defendant touching the alleged alteration of the bond, and to the conditions upon which, it was claimed, defendant Levy only agreed to execute it, and also to the decision of the court, permitting the bond to be inspected by the jury, and in giving it in evidence to the jury. The witness, Martin, testified that he recognized the instrument, and that he took the justification of Sims, whose signature appeared to it.

The plaintiff formally objected to any evidence of or concerning the signature of the said Sims, or of said erasure, or of any alteration of said bond. The counsel for the defendant admitted that no change or alteration had been made in the bond since it was signed by defendant Levy. Whereupon the defendant's counsel offered the following propositions:

1. We propose to show by this witness (Martin), that Mr. Sims, when he signed this bond and made his justification thereto, that he, Sims, expressly three times distinctly limited his liability to one thousand dollars, and stated at the time that he could not justify to more than one thousand dollars, that the one thousand dollars was placed on the bond at the time between the signature of the said Sims and the seal. This erasure was before the execution of the bond by the defendant Levy. 2. We propose to show further by this witness that the bond has been altered since said justification of Sims was made, and since said bond left the hands of said witness Martin.

The court overruled both propositions.

The following question was then propounded to this witness: Has this bond been altered since it left your hands when the justification of Sims was taken by you? This question was objected to and the objection sustained.

The defendant's counsel then called J. C. Sims, to whom the following questions were put: To what amount did

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you justify? and Has that bond been altered by erasure since you signed it; if so, what has been erased? To both of which the plaintiff's counsel objected, and the objection was sustained.

A. Heed was then called as a witness for defendant, who was asked: Did you in the presence of Mrs. Ray have any conversation with defendant Levy before he signed the bond in suit, and did he not limit his liability upon said bond by the condition that another good and sufficient surety equal in amount and value to himself in the sum of two thousand dollars should be procured to go upon the bond with him? This question was objected to by plaintiff, and the objection sustained. /

The plaintiff then offered the bond in suit in evidence, which was objected to by the defendant, and the objection overruled, and the bond was read to the jury.

It is not necessary to consider at length the questions raised upon these rulings of the court, for they have been pretty fully discussed already, but it may be well to say, that no presumption can be derived from the proposed testimony, that the plaintiff erased, or caused to be erased, the figures which it is claimed attached to Sims' name, and for this reason, that if done at all, it was done before the execution of the bond by Levy, and of course before it came into the hands of the plaintiff, as is shown by the defendant's own admission.

As the introduction of the bond in evidence was necessary to establish the plaintiff's case, and as its execution was not denied in the answer, there was no error in letting it go to the jury. There have been many points raised in the case by the assignment of errors, which in their essential features are the same as have been already discussed. This has made the duty of examining them very laborious, and as it was unnecessary to the defendant's case, we can not refrain from expressing our disapproval of the practice of incumbering a record with needless repetitions.

There have been many errors and defects in the pleadings and proceedings in the various stages of the case, but we can not say that they affect the substantial rights of the

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party complaining. When such appears to be the case, we must hold under the statute, that the judgment, for this reason, should not be reversed.

After a patient and most thorough examination of the questions involved, we are constrained to hold that there was no error in the judgment of the court below, or in the order overruling the motion for a new trial, and that both must be affirmed at appellant's cost.

PARADINE LINDSAY, APPELLANT, v. ANNEAS WYATT,
RESPONDENT.

CLAIM AND DELIVERY—PLEADING—NEW MATTER.—When, in an action in claim and delivery for the recovery of personal property, the complaint alleges ownership and a right to the possession, the answer denying these allegations, it is not error in the court to allow the defendant to prove his right to the possession by virtue of a lien to defeat a recovery by plaintiff. The establishment of such right by defendant is not new matter required to be affirmatively pleaded.

APPEAL from the second judicial district, Ada county.

Huston & Gray, for the appellant.

F. E. Ensign, for the respondent.

PRICKETT, J., delivered the opinion. HOLLISTER, C. J., and CLARK, J., concurring.

Action of claim and delivery for the recovery of a mare. The complaint alleges that at the commencement of the action, the plaintiff was the owner and entitled to the possession of the property therein described, and that defendant, after demand by plaintiff for its possession, unlawfully detained the same. The answer denies that plaintiff was the owner, or was entitled to the possession of the property; or that the defendant ever unlawfully withheld or detained it from the plaintiff. The cause was tried, and a judgment rendered for the defendant.

The case is brought to this court upon a bill of exceptions, from which it appears that upon the trial, the defendant while being examined as a witness in his own behalf,

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was asked the following question: "Have you had the care and keeping of the mare in question since the same was foaled; if so, how long have you had the mare in keeping, and what is it worth? To this question plaintiff objected, as being irrelevant and inadmissible under the pleadings, because there was no special property or claim for keeping, alleged in the answer. The defendant's counsel stated that the object of the inquiry was to establish a right of possession and a special property to the mare in question to be in the defendant under a lien for keeping the same. The court overruled the objection and plaintiff excepted. The answer to the question does not appear in the record.

It is urged by the plaintiff and appellant, that in order to entitle the defendant to prove a claim to the property or its possession under or by virtue of a lien, he should have set up such claim, and alleged such lien, affirmatively, in his answer. That it is new matter which must be pleaded, in order to admit evidence of it. The true test whether matter is new, within the meaning of the code requiring a statement thereof to be contained in the answer, can best be determined by the effect and operation that it has upon the issues presented by the complaint. If it only controverts the original cause of action, tendering no new issue, it is merely a traverse, as nothing new is involved in it; and it can not be called new matter, even though the traverse be expressed in affirmative words. If, on the other hand, it raises a new issue, or involves the introduction of a new ingredient as the basis of one, by way of confession and avoidance, then it is new matter, and must be pleaded affirmatively.

Looking to the pleadings in this case, we find that the plaintiff, by her complaint, alleges ownership of the property and a right to its immediate possession. These allegations authorized the plaintiff to prove her ownership and her right to possession, by showing how she became owner and entitled to possession; and if it was through purchase from a former owner, who had in any manner pledged the property to the defendant, it was certainly competent under her pleading for plaintiff to show that she had become

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entitled to its possession by payment, or by tendering to the pledge, the sum of money secured by the pledge of the animal in question.

The defendant's answer denies the ownership and right of possession in the plaintiff, and the unlawful detention of defendant. These denials put in issue the allegations of the complaint. If instead of denying, in this manner, the defendant had affirmatively stated that he, or a third person, was the owner, or entitled to the possession of the property, and had stated the facts constituting the basis of such rights, he would not thereby have tendered a new issue, but would, by affirmative language, have merely negatived the plaintiff's allegations. If, as we have asserted, it was proper for the plaintiff, under her general allegation of ownership and right to the possession, to show that she had tendered defendant the amount of his lien, it was equally proper for the defendant, under his denials, to offer evidence to show that he had a valid subsisting lien upon the property.

The conclusion arrived at is, that the plaintiff's alleged ownership and right to the possession of the property was put in issue by the denials of the answer, and that the district court committed no error in allowing the defendant to prove a lien, as the basis of a right in himself to the possession of the mare, and thus to disprove the plaintiff's alleged title to the immediate possession.

The judgment of the district court is affirmed.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

JANUARY TERM, 1879.

PRESENT:

HON. JOHN CLARK,
HON. H. E. PRICKETT, } JUSTICES.

D. B. ETHELL, ADM'R, RESPONDENT, v. B. J. NICHOLS, APPELLANT.

PROBATE COURTS—JURISDICTION.—Probate courts are courts of special and limited statutory jurisdiction.

PROBATE COURT—SALE OF REAL ESTATE BY.—An order for the sale of real estate, under the provisions of the probate act, is a judgment in a new, separate, and independent proceeding, depending for its validity upon the sufficiency of the facts alleged in the petition for the order.

IDEM—JURISDICTION.—It is necessary to the jurisdiction of the probate court making the order of sale of real estate, that there should be a petition therefor, sufficient, in substance, to show legal grounds for the order; and it is necessary to prove that there was such a petition when the jurisdiction of the probate court to make the order of sale is controverted.

APPEAL from the second judicial district, Alturas county.

Brumback & Cahalan, for the appellant.

R. A. Sidebotham and Alanson Smith, for the respondent.

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PRICKETT, J., delivered the opinion. CLARK, J., concurred.

This action was brought under section 171 of the probate practice act, to recover a deficiency between the price bid by the defendant Nichols at an administrator's sale of real estate, and the sum realized therefor at a resale, upon a refusal of the defendant to comply with the terms of the original sale.

The plaintiff alleges in his complaint, that on the twenty-first day of March, 1870, one E. P. Rice, died intestate; that on the fifteenth day of May following, he was duly appointed administrator of the estate of said Rice, deceased, and that he thereupon qualified and entered upon the duties of that trust; that on or about the first day of March, 1871, by virtue of an order of sale, duly made by the probate court of Alturas county, as administrator, he sold to the defendant for the sum of five hundred dollars in gold coin, all the right, title, interest, and estate of said intestate, at the time of his death, in and to a certain toll wagon-road described in the complaint; that on the sixth day of April, 1871, such sale was duly confirmed; that on or about the twenty-fifth day of September, 1871, at the request of defendant, and upon the permission of the probate court, the return of sale was amended so as to include certain liens which the said estate held upon and against the property sold; and changing the kind of money to be paid by the purchaser Nichols from coin to currency; that plaintiff afterwards offered and tendered to defendant a good and sufficient deed of the property, which he refused to accept, and that he also refused payment of the purchase price, or any part thereof; that after due and legal proceedings had, the same property was afterwards resold for one dollar, and that such resale was duly confirmed. The prayer of the complaint is for the sum of four hundred and ninety-nine dollars deficiency, with interest and costs.

After demurrer to the complaint, overruled, the defendant answered, denying and putting in issue every material allegation of the complaint. A trial was had at the August term of the court, 1877, resulting in a verdict and judgment

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in favor of the plaintiff for five hundred and seventy-six dollars and forty-five cents and costs; from which judgment the defendant appealed to this court.

The bill of exceptions shows that during the trial numerous exceptions were taken by the defendant, and the rulings, decisions, and instructions of the court below, so excepted to, are assigned as error. The first alleged error is the order of the court overruling the demurrer to the complaint. We are satisfied that this exception was not well taken, and that the demurrer was properly overruled. It is not necessary, however, to state at length the reasons for holding the complaint to be sufficient, as the next assignment of error is well taken, and is decisive of the case against the plaintiff.

On the trial the plaintiff offered in evidence an order of sale of the probate court of Alturas county, dated the twenty-third day of January, 1871, authorizing and directing the administrator to sell the real estate mentioned in the complaint. The attorney for the defendant objected to its introduction, on the ground that no petition for such order had been introduced or shown to exist. The court overruled the objection, holding that the order authorizing the sale and the order confirming the sale were sufficient evidence to conclude the defendant. The defendant excepted to that ruling of the court, and assigns the same as error here.

The complaint, as already stated, alleges that the sale to Nichols was made by virtue of an order of sale duly made by the probate court. This form of allegation, under section 59 of the civil practice act, is equivalent to a full and complete statement of all the facts which conferred jurisdiction upon the probate court to make the order of sale. The probate courts of this territory are courts of special and limited statutory jurisdiction, and this allegation of the complaint being controverted by the defendant's answer, if the fact that there was a petition for the order of sale is a material and jurisdictional fact, the plaintiff was bound to establish that fact on the trial, in order to show jurisdiction in the probate court to make the order.

Our statute prescribes with particularity what facts are

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necessary to be stated in a petition for an order to sell real estate of a deceased person. It is first provided that the personal estate shall be primarily liable for the debts and expenses; and if this is insufficient to pay the same and the allowance to the family, section 154 of the probate practice act provides that the executor or administrator may sell the real estate for that purpose, upon order of the probate court. Section 155 provides as follows:

“To obtain such order he shall present a petition to the probate court, or to the judge at chambers, setting forth the amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the deceased, as far as the same can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same shall have been in force for one year; the debts, expenses, and charges of the administrator already accrued, and an estimate of what will or may accrue during the administration; a description of all the real estate of which the testator or intestate died seized, or in which he had any interest, or in which the intestate estate has acquired any interest, and the condition and value of the respective portions and lots, and whether the same be separate or community property; the names and ages of the devisees, if any, and of the heirs of the deceased; which petition shall be verified by the oath of the party presenting the same.”

Section 156 provides, that “if it shall appear to the court or judge, by such petition, that it is necessary to sell the whole or some portion of the real estate, for the purpose mentioned in section 154 of the act, or any or either of them, such petition shall be filed, and an order shall thereupon be made, directing all persons interested in the estate to appear before the court at a time and place specified, etc., to show cause why an order should not be granted to the executor or administrator, to sell so much of the real estate of the deceased as shall be necessary.” Section 157 directs how the order to show cause shall be served on the parties interested in the estate. Sections 158 to 161, inclusive, provide for the hearing of the petition, and the trial of any

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issues that may be made thereon by the parties interested; and section 162 provides that, "If the court shall be satisfied, after a full hearing upon the petition, and an examination of the proofs and allegations of the parties interested, that a sale of the whole, or some portion, of the real estate is necessary, for any of the causes mentioned in sections 150 and 154 of the act, or if such sale be assented to by all the persons interested, an order of sale shall be made," etc.

An order for the sale of real estate, under the provisions of the statute above cited, is not one made in a pre-existing proceeding, in which the court has already acquired jurisdiction, but it is in reality a judgment in a new, separate, and independent proceeding, depending for its validity upon the sufficiency of the facts contained in the petition. It is absolutely necessary, to the jurisdiction of the court making the order or judgment of sale, that there should be a petition, sufficient in substance, to show legal grounds for the order; and an order of sale, without any petition therefor, would be void.

It follows that if a petition is necessary to the jurisdiction, as above decided, it is quite as necessary that it should be produced in evidence on the trial, when, as in this case, the jurisdiction of the court to make the order of sale is controverted.

Numerous other assignments of error have been made upon this appeal, some of which are well taken, and if this case could be remanded for a new trial we should feel it incumbent upon us, for the direction of the court below, to pass upon them separately; but upon an inspection of the record it is patent that no recovery can be had by plaintiff in this action upon existing facts. The evidence incorporated into the record shows conclusively that at the time of the alleged filing of the petition for the original sale, the plaintiff was in the state of California; that at the time of the alleged sale the defendant Nichols was not within Alturas county, and that he had no agent for the purpose of purchasing the real estate mentioned therein. It further appears that the administrator was not in the territory when

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the report of sale was made, but that it was made by a person purporting to act as his attorney. The duties and trusts of an administrator can not be delegated to, or performed by another acting for him, and it follows that the alleged sale to Nichols was never made in the manner pointed out by the statute, or in any such manner as to bind him as the purchaser.

It is claimed, however, that the subsequent appearance of the defendant in the probate court, for the purpose of procuring an amendment of the alleged report of sale was such an admission on his part as estops him from denying the sale. As a matter of fact, appearing from the record, the amendment so made was wholly immaterial, as all liens held by the estate would have passed by the administrator's deed to the purchaser, if the sale had been valid, and five hundred dollars in gold coin, or its equivalent in currency, specified as the purchase price in the paper called a report of sale, is not changed in legal effect by amending it to read "five hundred dollars in currency;" but it can make no difference how much the report of sale may have been or was amended; the original sale being void, all subsequent proceedings, based thereon, necessarily partake of the original defect, and are also void.

Judgment reversed, and cause remanded with directions to dismiss.

R. B. BROWN, APPELLANT, v. R. BLEDSOE AND C. W. MOORE, RESPONDENTS.

PURCHASER OF REAL ESTATE—REPRESENTATIONS BY VENDOR.—A purchaser of real estate is bound to exercise ordinary prudence and discretion, and if the means of knowledge are within his power, and he neglects to make the proper inquiry, he loses his remedy against the vendor, for any representations the latter makes.

FRAUDULENT REPRESENTATIONS BY VENDOR.—False representations by a vendor to the purchaser, as to the situation, condition, and value of real estate, are not actionable, even though knowingly made, unless the purchaser has been fraudulently induced to forbear inquiry as to their truth.

APPEAL from the second judicial district, Alturas county.

Brumback & Cahalan, for the appellant.

Huston & Gray and V. S. Anderson, for the respondents.

CLARK, J., delivered the opinion. PRICKETT, J., concurred.

The defendants demurred to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action. The court below sustained the same and gave judgment for defendants. A demurrer on this ground will lie when the defects in the complaint are such as would render the court bad on general demurrer at law, or bad for a want of equity in chancery. The complaint, therefore, to be overthrown on this ground, must present defects so fatal in character as to authorize the court to say, taking all the facts to be admitted, that they do not set forth a cause of action.

The action is for false and fraudulent representations, made by defendants to plaintiff, whereby he was induced to purchase certain mining ground mentioned and described in the complaint, to his damage, in the sum of twenty thousand and forty-nine dollars and forty-eight cents. In order to maintain this action, the complaint must allege substantially: 1. That the representations made by defendants were false; 2. That defendants knew them to be false; 3. That they made them with intent to defraud plaintiff; 4. That such representations were material, and not matters of opinion; 5. That the plaintiff relied upon such representations in making the contract or doing the act from which the damages arose; 6. That plaintiff was fraudulently induced to forbear inquiry as to the truth of the representations made by defendants.

The representations complained of as fraudulent in this action, were made prior to June 23, by defendant Bledsoe to plaintiff, at San Francisco, state of California. On that day, as appears by the complaint, the plaintiff and defendant, Bledsoe, at the place aforesaid, entered into an agreement in writing (which agreement is annexed to and made a part of the complaint, and marked exhibit "A"), whereby

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defendant Bledsoe agreed to convey, or cause to be conveyed, to plaintiff, his heirs or assigns, five sixths of the mining property described in the first subdivision of the said agreement, upon the terms and conditions in said agreement contained.

The plaintiff, his heirs, or assigns, were to elect or determine on or before the tenth day of July, 1877, whether he or they shall purchase the said mining ground upon the terms and conditions specified in the agreement aforesaid. It will be observed that the plaintiff had about seventeen days from the time of making the agreement within which to make himself acquainted with the character and value of the property contracted to be sold, and of the truth or falsity of the representations complained of in this action, before making a purchase of the property. The complaint does not show that plaintiff made any effort between the twenty-third day of June, 1877, and the tenth day of July, 1877, to ascertain the condition, character, or value of the property contracted to be sold, or as to the truth or falsity of the representations complained of in this action, neither does the complaint show that defendant Bledsoe or defendant Moore, their agents, or other persons under them, or either of them, made any effort in any way or manner to induce the plaintiff to forbear inquiry concerning the property, or the property adjoining the same on the east or west boundaries thereof, or to forbear inquiry as to the truth of the statements or representations made by defendant Bledsoe, and set forth in the complaint as the grounds of this action, and from all that appears in the complaint, the plaintiff had full liberty and free access to the property, so that he might become fully acquainted with the same, before he was required under the agreement to purchase or not.

A purchaser is bound to exercise ordinary prudence and discretion, and if the means of knowledge are within his power, and he neglects to make the proper inquiry, he loses his remedy against the vendor for any representations the latter may make. (*Bell v. Byerson*, 11 Iowa, 233; *Schemerhorn v. George*, 13 Abb. Pr. 315; *White v. Leaver*, 25 Barb.

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235; *Burton v. Willers*, 6 Litt. 32; *Parker v. Moulton*, 19 Ames. 315; *Ellis v. Andrews*, 15 Id. 379).

False representations as to the condition, situation, and value of real estate knowingly made by the vendor to the purchaser, are not actionable unless the purchaser has been fraudulently induced to forbear inquiry as to their truth, and in such case the means by which he has been thus induced to forbear inquiry must be specifically set forth in the declaration: (*Parker v. Moulton*, 19 Am. 315; *Ellis v. Andrews*, 15 Id. 379; *Gordon v. Parmalee*, 2 Allen, 212; *Brown v. Castels*, 11 Cush. 348; *Vesey v. Doten*, 3 Allen, 380.)

The complaint is silent as to the acts of the plaintiff concerning the property, and also as to his investigations as to the truth of the representations made to him by defendant Bledsoe, between the twenty-third day of June, 1877, but alleges that on the latter day he notified the defendants by telegraph that he would purchase the property; it further alleges that in pursuance of the terms of the agreement he expended, in the month of July, 1877, in prospecting and developing the mine, the sum of four hundred and thirty-one dollars and eighty-four cents; that he paid to Costou Simmons the sum of two thousand six hundred and twenty-five dollars on the purchase price of said property; that in August, 1877, he expended in prospecting and developing the mine the further sum of four thousand four hundred and nine dollars and ninety-five cents. In September, 1877, for the same purposes, four thousand and one dollars and ninety-nine cents. In October, 1877, for the same purposes, three thousand five hundred and thirty-two dollars and forty-one cents. In November, 1877, for the same purposes, two thousand four hundred and eighty-seven dollars and twenty-nine cents. That he expended for the same purposes in the manner indicated by defendant Bledsoe, but under his own supervision, in December, 1877, the sum of one thousand and ten dollars, and twenty-five cents, and in January, 1878, the further sum of one thousand and fifty dollars and twenty-five cents.

By reference to the agreement it will appear that the

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plaintiff was required to expend for the purposes aforesaid one thousand five hundred dollars per month for four consecutive months, commencing after the tenth day of July, 1877, yet notwithstanding said agreement he expended large sums of money for the purposes aforesaid, for three months after the expiration of said four consecutive months, and that his expenditures during said four months were greatly in excess of the amount agreed upon to be expended by the terms of the contract. The complaint does not allege that plaintiff was induced to make such excessive expenditures by reason of any representations made to him by defendants or either of them. They were all made after he entered upon the property, and after he had an opportunity of ascertaining the truth or falsity of the representations made to him by defendant Bledsoe, and after an opportunity of fully understanding the condition, situation, character, and value of the property contracted to be sold to him under the agreement; he made these expenditures after his means of knowing all matters relating to the property were as good as those of the defendants. We conclude therefore that plaintiff did not rely upon the representations made to him by defendant Bledsoe, on and prior to the twenty-third of June, 1877, in making said expenditures, but on the contrary rested upon his judgment in such matters. (Kerr on Fraud and Mistake, 75, 77, 78, and authorities therein cited; *Fallow v. Hood*, 34 Pa. St. 305; 2 Pars. on Con. 270, *et seq.*; *Clark v. Enhort*, 63 Pa. St. 347; Story on Con., sec. 510.)

The complaint does not allege that the defendants or either of them represented to the plaintiff that the property contracted to be sold to plaintiff was of value, nor does the complaint allege that the same is not valuable.

Fraud can not be predicated on an inference drawn by plaintiff from statements alleged to have been made by defendants. (Kerr on Fraud and Mistake, 73, *et seq.*, and authorities therein cited.) The allegations in the complaint concerning the adjoining Monarch mine and the Buffalo mine, and the value of the ores taken therefrom, as well as the value of the ores on hand at said mines, can only

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be considered as matters of opinion or such general terms of commendation as are permissible. (Kerr on Fraud and Mistake, 82–84, and citations.)

After a careful consideration of the complaint and agreement we are constrained to the opinion that the defects in the complaint above stated are so fatal in character as to destroy the force of the pleading and prevent a recovery in this action.

There are other points presented by counsel which we do not consider, but prefer to rest our judgment on the grounds above stated.

The judgment of the court below is affirmed.

REPORT OF A CASE

DETERMINED IN THE

SUPREME COURT,

SEPTEMBER TERM, 1879.

PRESENT:

HON. JOHN T. MORGAN, CHIEF JUSTICE.

HON. H. E. PRICKETT, JUSTICE.

THE PEOPLE, RESPONDENTS, *v.* THOMAS J. CURTIS,
APPELLANT.

QUO WARRANTO—DISTRICT COURT—JURISDICTION.—An action for the usurpation of an office, in the nature of *quo warranto*, brought in the name of the people, on the territorial side of the district court, for the removal of a county officer, is properly brought.

PLEADING—ANSWER—DENIALS UPON INFORMATION AND BELIEF.—A denial in an answer of the material averments of the complaint, upon information and belief, is sufficient to raise an issue to be tried, if the facts are not within the personal knowledge of the answering defendant.

QUALIFICATIONS TO HOLD OFFICE.—If a person elected to a county office is not qualified to hold and enter into the same, at the time fixed by law therefor, the office is vacant and may be filled by appointment.

APPEAL from the second judicial district, Ada county.

Brumback & Cahalan, for the appellant.

Huston & Gray, for the respondents.

Opinion of the Court—Morgan, C. J.

MORGAN, C. J., delivered the opinion, PRICKETT, J., concurring.

This is an action brought by the people of the United States in the territory of Idaho, on the relation of W. W. Glidden, against Thomas J. Curtis, to test the right of the said Curtis to hold and exercise the duties of the office of probate judge of Ada county, in the territory of Idaho. The complaint states substantially as follows, to wit: That on the fifth day of November, A. D. 1878, an election was held in the county of Ada, in the second judicial district of the said territory of Idaho, for the office of probate judge of said county of Ada. That at said election, the said Thomas J. Curtis received the greatest number of legal votes for the said office of probate judge. That said Curtis was not then qualified to hold said office, nor has he since become so qualified, for the following reasons:

1. That said Curtis, on the fifth day of November, A. D. 1878, was a member of the legislative assembly of Idaho territory, having been elected to said position on the seventh day of November, A. D. 1876, for the period of two years, from the fourth of December, A. D. 1876. That at the ninth session of the legislative assembly of said territory, which convened at Boise city, the capital of said territory, on the fourth day of December, 1876, and of which the said Curtis was a member, an act was passed, entitled, an act fixing the salary of the probate judge of Ada county, and providing for the payment of the same, which act, by its provisions, increased the emoluments of said office of probate judge of said county, in the sum of about four hundred dollars per annum, from and after the passage of said act. That said act was approved January 12, 1877, and was, by its provisions, to be in force from and after its passage. That the said defendant did, on the seventh day of January, 1879, usurp said office, and has ever since, and still does, wrongfully and illegally hold the same.

To which defendant answers as follows:

1. Upon information and belief defendant denies that the emoluments of the office of probate judge of Ada county, Idaho territory, have been increased by any law

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passed by the ninth session of the legislative assembly, in the sum of four hundred dollars, or any other sum. Defendant also alleges that on or before the fifteenth day of December, A. D. 1877, the defendant removed from Alturas county, Idaho territory, and from and after said date ceased to be a resident of Alturas county in said territory, and by virtue of the law in such case made and provided, the defendant, from and after said fifteenth day of December, A. D. 1877, ceased to be a member of the legislative assembly of Idaho territory.

This answer was verified by the affidavit of the defendant, upon information and belief as to matters stated in answer upon information and belief. Upon the filing of the answer in the court below, counsel for the prosecution entered a motion to strike out the answer and for judgment on the pleadings; assigning as a reason in support of said motion that the answer was not sufficient, the denial being made upon the information and belief of the defendant. The court sustained the motion and gave judgment on the pleadings.

Defendant brings the case by appeal to this court, and, among others, assigned the following for error: 1. The territorial side of the court and the territorial officers have no jurisdiction. 2. The court erred in sustaining plaintiff's motion to strike out defendant's answer and for judgment on the pleadings. 3. The judgment of ouster should not have been extended beyond the fourth of December, 1879. These questions will be examined in their order.

The manner and method of the election of the probate judge, his term of office, and the time when he shall enter upon the duties thereof, are all provided for by the statutes of the territory. (Rev. Stat., sec. 3, p. 684; Id., sec. 35, p. 693.) His salary and fees are paid by the county for which he is elected, and by the people thereof. His jurisdiction is confined to the limits of the county in and for which he is elected. The method of testing the eligibility and the qualification of the person who assumes the duties of the office of probate judge is provided by the laws of this territory. He is in every sense a county officer. The case

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referred to by counsel for defendant, *Territory v. Lockwood*, 3 Wall. 236, does not support the position assumed by the defense. That was a case brought in the name of the *Territory of Nebraska ex rel. Eleazor Wakely*, to test the right of the defendant Lockwood to hold and exercise the duties of the office of associate justice of the supreme court of said territory, and the court hold that the judges of the supreme court of the territory of Nebraska are appointed by the president, under the authority of the laws of the United States. The people of the territory have no agency in appointing them and no power to remove them. That therefore a suit brought in the name of the territory to remove one of them was improperly brought.

The conclusion is irresistible, that a suit brought in the name of the people of the territory, on the territorial side of the court, for the removal of a county officer, is properly brought. The next question to be considered by the court is as to whether a denial of the material allegation of the complaint upon information and belief, is a sufficient denial, or whether such denial should have been positive and specific. The authorities are clear, that if the facts set forth in the answers are within the personal knowledge of the defendant, then the denial should be specific and positive. On the contrary, if the facts upon which the denial in an answer is based must be ascertained by inquiry from other persons, or by examination of, or computation from, books and records, may be within the custody and control of the defendant, then a denial upon information and belief is sufficient. (*Vassault v. Austin*, 32 Cal. 607, and cases there cited.)

The fact as to whether the compensation of the probate judge of Ada county was increased by the law in question, could only be ascertained by the defendant by an examination of the records of his predecessor. It is indeed doubtful if he could by that means ascertain what the prior incumbent had received from the county as fees, as there seems to be no law compelling the probate judge to keep an account of the fees received by him from the county. He must finally, we think, have been obliged to go to the rec-

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ords of the county commissioners to ascertain what fees had been allowed and paid to his predecessor. The facts could only have been ascertained by an examination of records possibly within his reach, but not such as he would be presumed to know the contents of.

The court is of the opinion therefore, that the denial of the material averments in the complaint "upon information and belief," was sufficient to raise an issue, which should have been tried by the court. As to the judgment of ouster, section 1854, revised statutes of the United States, is substantially as follows: No member of the legislative assembly of any territory now organized, shall hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected and for one year after the expiration of such term. If, therefore, the salary of the probate judge of Ada county had been increased by the assembly of which defendant was a member, he would be ineligible to hold said office for three years from the fourth day of December, A. D. 1876.

By the provisions of section 35, of the act relative to elections (revised statutes, p. 693), all county officers are required to enter upon the duties of their respective offices on the first Monday in January following their election.

If, therefore, the defendant was not qualified to enter upon the duties of the office of probate judge of said county, on the first Monday of January, 1879, the said office would become vacant, and the vacancy might be filled in accordance with the provisions of sections 45 of the last-mentioned act, and the office to be again filled at the next general election as provided by law.

We are of the opinion, therefore, that the court below erred only in sustaining motion of the counsel for the prosecution, to strike out defendant's answer and giving judgment on the pleadings.

Judgment of the court below reversed and the cause remanded for trial upon the issues made by the pleadings.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

SEPTEMBER TERM, 1880.

PRESENT:

HON. JOHN T. MORGAN, CHIEF JUSTICE.

HON. H. E. PRICKETT, } JUSTICES.

HON. NORMAN BUCK, }

THE PEOPLE, RESPONDENTS, *v.* TIMOTHY O'CONNER,
APPELLANT.

RECORD—BILL OF EXCEPTIONS—STATEMENT—ASSIGNMENT OF ERRORS.—

When a transcript on appeal in a criminal case contains no bill of exceptions or statement, and no assignment of errors, there is nothing for the consideration of the appellate court, but the indictment, the minutes, and the instructions.

APPEAL from the third judicial district, Lemhi county.

No appearance for the appellant in this court.

James H. Hawley, district attorney, for the respondents.

PRICKETT, J., delivered the opinion. MORGAN, C. J., and BUCK, J., concurred.

The defendant was indicted at the July term, 1880, for the crime of murder committed in killing one William Ludeman on the third day of February, 1880, and being

Points decided.

tried, was convicted of murder in the first degree, and was thereupon sentenced to be executed on the seventeenth day of September, 1880. His motion for a new trial having been overruled, an appeal from the judgment was taken to this court.

It is to be regretted in any case, particularly in one involving the life of a human being, that the appeal to this court should be imperfectly presented. There is matter contained in the transcript purporting to be the testimony in the case, rulings of the court on the admissibility of evidence, and affidavits on the motion for a new trial; but there is no bill of exceptions, or statement certified to by the judge or authenticated in any manner whatever. There is nothing to show that the affidavits purporting to have been used on the motion for a new trial were so used. This court can not consider such matter, and it might as well have been left out of the transcript altogether.

There is no assignment of errors on file, nor any appearance for the defendant in this court. Upon this state of facts we should be fully warranted in dismissing the appeal, but considering the importance of the case, we have thought it proper to examine the record. There is nothing before this court, however, for consideration, except that which the statute makes matter of record, namely, the indictment, the minutes of the court, and its instructions. These we have carefully examined and find no error therein.

The judgment of the district court is therefore affirmed, and a remittitur is ordered to be issued forthwith.

W. A. CALDWELL, APPELLANT, v. RICHARD RUDDY,
RESPONDENT.

DISMISSING APPEAL.—If the record shows no notice of appeal, and it does not, in some way, affirmatively appear that a proper notice has been filed in the office of the clerk of the court below, the appeal will be dismissed.

APPEAL from the first judicial district, Nez Perce county.
Motion to dismiss the appeal.

Opinion of the Court—Morgan, C. J.

Huston & Gray, for the motion.

A. E. Isham, contra.

MORGAN, C. J., delivered the opinion. PRICKETT and BUCK, JJ., concurred.

This cause was tried in Nez Perce county, in this territory, before the district court and a jury. It appears from the record, that the cause has been twice tried; at what time and before whom the first trial was had, does not appear. That said trial resulted in a verdict for defendant; that afterwards a motion, based upon affidavits, was made for a new trial. The above motion was heard by the Hon. Norman Buck, by him sustained, and a new trial granted. The plaintiff then interposed a motion for a continuance, which was heard and overruled. The case then went to trial, and on the twenty-second day of April, 1880, the jury rendered a verdict against the plaintiff and in favor of the defendant. A motion was then made to set aside the last verdict, which was denied by the court below and final judgment entered thereon, April 29, 1880. The plaintiff sought an appeal to this court, although from what judgment or order in the court below he desires to appeal, does not appear, as no notice of appeal appears in the record.

Section 438, page 180, Revised Statutes, states that appeals shall be made by filing with the clerk of the court with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy thereof upon the adverse party or his attorney.

Section 448 requires that "on an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and any bill of exceptions, etc., or statement in the case upon which the appellant relies. Section 450 states that on an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of the appeal, etc. These copies must be certified to be correct by the clerk or the attorneys.

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Appellant's attorney now asks this court to enter an order directing the clerk of the district court to send up a copy of the notice of appeal, and various other papers. It does not appear from the affidavit of the attorney for appellant that any proper notice of appeal was ever placed on file in the court below.

An unauthenticated telegram is presented to the court, which in reply to the following question, "When were bond and notice of appeal served and filed in *Caldwell v. Ruddy*?" states May 20 and 21, 1880. If this were deemed by the court proper evidence of the facts stated therein, it still appears, from the affidavit of appellant's attorney, that no *præcipe* was ever placed on file directing the clerk what papers and records he should copy and send to this court.

To rely upon the judgment or knowledge of the clerk as to what were proper papers to send up, would be a practice entirely too loose and uncertain to be approved by this court. The entry of this order now would render a continuance of the hearing of this cause until the next term of this court necessary, which would cause a year's delay in the execution of the judgment. For aught that appears in the record, this appeal may be sought for delay alone, and the appellant thereby accomplish by his own negligence what he could not accomplish had his duties been properly performed.

It seems from the affidavit also, that appellant desired a copy of the original answer, the demurrer, and the amended answer to be sent up. Various orders, judgments, and decrees of the court may be appealed from, and in such case a different set of papers should be sent up. The clerk can not in each case be expected to know what should be sent.

The appellant having failed to furnish the requisite papers, and failed to furnish any sufficient excuse therefor, it is the opinion of the court that the appeal should be dismissed, and it is dismissed accordingly. Appeal dismissed without prejudice.

Points decided.

THE UNITED STATES, RESPONDENT, *v.* WILLIAM MAYS AND W. H. OVERHOLT, APPELLANTS.

TERRITORIAL DISTRICT COURTS—PRACTICE IN.—The territorial district courts are not district courts of the United States. The legislature may prescribe the practice in the district courts of the territory, in cases arising under the constitution and laws of the United States, as well as in those arising under the laws of the territory. In this territory, however, the legislature has not done so; and the courts are at liberty to make orders and adopt regulations concerning the practice in United States cases, for themselves.

TERRITORIAL COURTS—JURISDICTION.—The courts of the territory are in some respects *sui generis*. They have a broader and more extensive jurisdiction than state courts, or the district and circuit courts of the United States.

JURY FROM THIS VICINAGE.—A jury summoned under the laws of the territory from the county in which the district court is being held, for the transaction of business under the territorial laws, may be adopted by the court for the transaction of business and the disposition of cases arising under the laws of the United States. Such a jury is, in every respect, from the vicinage, since it is drawn from the district within which the crime was committed, although the commission of the crime took place in another county of the district.

IDEM.—Congress having, by law, given the district courts of the territory jurisdiction of offenses against the laws of the United States, and having given the justices of the supreme court power to fix the times and places of holding district courts; by so fixing them they have also fixed the place of trial of offenses against the laws of the United States. Congress, therefore, having, by means of the power thus delegated, fixed the place of trial, has disposed of all questions of jurisdiction of the court, as well as all objections to the jury as not being drawn from the vicinage.

INSTRUCTIONS.—An instruction to the jury “that if they believe from the evidence that the defendants feloniously took possession of the United States mail, or any part thereof, by force or intimidation of or from a carrier of the mail, then the offense of robbery is complete,” is simply a definition of the term robbery, as applied to the case. It is not erroneous.

INDICTMENT.—An indictment must contain so many of the substantial words of the statute as shall enable the court to see on what statute it is framed, and such other words as are necessary to a complete description of the offense; or words which are their equivalents or more than their equivalents in meaning.

IDEM—JEOPARDY.—Jeopardy is putting in danger. The word danger is the equivalent of jeopardy. The words of an indictment, “in bodily fear and danger of his life, then and there feloniously did put,” are equivalent to the words “put his life in jeopardy.”

DANGEROUS WEAPONS, USE OF.—For a person to arm himself with dangerous weapons and carry them to the place of the robbery, with intent to kill, is the “use of dangerous weapons.”

Opinion of the Court—Morgan, C. J.

APPEAL from the second judicial district.

F. E. Ensign, for the appellants.

Huston & Gray, for the respondent.

MORGAN, C. J., delivered the opinion; PRICKETT, J., concurring. BUCK, J., having prosecuted in the court below as United States district attorney, took no part in the hearing or decision.

In November, 1879, the defendants were held by James Stout, Esq., United States commissioner, to await the action of the grand jury on a charge of robbing the United States mail in Owyhee county, Idaho territory. At the January term of the district court, held at Boise city, Ada county, Hon. H. E. Prickett presiding, a grand jury was summoned in conformity with the provisions of section 27 of an act concerning grand and petit jurors of the territory of Idaho, approved January 10, 1873, and were impaneled and sworn as a territorial grand jury. They were then charged and directed to inquire into offenses committed against the United States, in the second judicial district of which the said Ada and Owyhee counties were a part.

Defendants interposed a challenge in writing to the panel, on the ground that the said grand jury were not selected, summoned, or impaneled in accordance with any law of the United States, and that they had no jurisdiction to inquire into offenses against the laws of the United States, or any offense committed outside the limits of the county of Ada, which challenge was disallowed by the court, to which ruling defendants excepted. The said grand jury afterwards, to wit, on January 13, 1880, found and reported to the court a bill of indictment against the said defendants for robbing a carrier of the United States mail, of such mail in Owyhee county, in said territory.

Afterwards, on the seventeenth day of January, 1880, the said defendants were brought into court to be tried for said offense, by a jury selected in conformity with the laws of said territory, from the county of Ada alone, and summoned by the sheriff of said county. Before said jury

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were sworn and impaneled, the said defendants interposed a challenge to the whole panel and array of said jurors in writing, as follows, to wit: "That the offense to be tried was an offense against the laws of the United States, and that the said jury had not been drawn, selected, or summoned in conformity with any law of the United States;" which challenge was disallowed by the court, and the said defendants then tried, convicted, and sentenced to imprisonment in the territorial prison, at hard labor, for the period of their natural lives.

The part of the indictment necessary to notice is as follows: "The said defendants, William Mays and William H. Overholt, are accused by the grand jury, by this indictment, of the crime of robbing a United States mail carrier, of the United States mail, committed as follows: The said William Mays and William H. Overholt, on the twentieth day of November, 1879, at the county of Owyhee, in the territory of Idaho, in and upon one Joseph Goodwin, the said Joseph Goodwin then and there being a carrier of the United States mail, and the said Joseph Goodwin then and there having the said mail in his possession, feloniously did make an assault, and the said Joseph Goodwin, in bodily fear and danger of his life, then and there feloniously did put, and of the said mail then and there of the property of the United States, and of the value of one thousand dollars, from the person and possession, and against the will of the said Joseph Goodwin, then and there feloniously, and with force and violence, did rob, take, steal, and carry away, the said William Mays and William H. Overholt each then and there being severally armed with a dangerous weapon, to wit, a gun, with intent, if then and there resisted by the said Joseph Goodwin, the said Joseph Goodwin then and there to kill, against the peace," etc.

The instruction offered by the prosecution objected to by the defendant, and given by the court, is as follows: "The jury are instructed, that if they believe from the evidence that the defendants feloniously took possession of the United States mail, or any part of it, by force or intima-

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tion of or from a carrier of the mail, then the offense of robbery was complete."

The first and second objections to the proceedings of the court below, are to the manner of summoning and impaneling the grand and trial juries. We have examined all the authorities cited, which discuss the method of summoning juries for territorial courts, in the trial of offenses against the laws of the United States, with the following result: The case of *Clinton v. Englebrecht* was one arising wholly under the statutes of the territory of Utah, and the supreme court, in that case, simply decide, that the territorial court is not a district court of the United States; and that the legislature of the territory having prescribed the mode in which juries should be drawn and summoned for the district court, it was proper and necessary that said court should follow the mode therein pointed out.

In this territory, the legislature has not pointed out the method to be pursued by the district court while sitting for the trial of offenses against the laws of the United States.

This is clearly indicated by the fact that the grand and petit juries, to be drawn for the district court, have a jurisdiction restricted to the county in which the court is, for the time being, in session. It is said, in *United States v. Dawson*, 15 How. 467 (20 Curt. 598), that congress, having fixed the place of the trial of an offense against the laws of the United States, committed outside the limits of a state, disposes of all questions of jurisdiction as to venue, trial in the county, and jury from the vicinage.

Congress has by law given the district court of this territory jurisdiction of offenses against the laws of the United States. It has further given the judges of the supreme court power to fix the times and places of holding the said court. The judges have so fixed them. By fixing the place of holding the court, they have fixed the place of trial of such offenses. Congress, therefore, having by means of the power delegated to the judges of this court fixed the place of the trial of the offense mentioned in this indictment, has, in the language of this decision, disposed of all questions

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of jurisdiction of the court as well as all objections to the jury as not being drawn from the vicinage.

The court, in the *United States v. Dawson*, referred to above, decided that a grand and petit jury drawn from the district and state of Arkansas was a proper and competent jury in each case to find a bill of indictment and try a person for a crime committed outside of the said state of Arkansas; and in the adjoining Indian territory, it follows by a parity of reasoning, that congress, although by indirect means, having fixed the place of trial of the offense charged against these defendants, the grand and petit jury in use in said court was a proper and legal jury to whom to submit the cause.

Again, it may be said, considering the powers of the said district court as a court sitting for the trial of offenses against the laws of the United States, that congress has by law conferred upon the territorial court the same jurisdiction possessed by the district and circuit courts of the United States in all cases arising under the constitution and laws of the United States. (Rev. Laws U. S., sec. 1910.) The means and methods to be used in exercising such jurisdiction, so far as the impaneling and summoning jurors is concerned, have not been pointed out or fixed by congress, neither have they by the laws of the territory of Idaho.

It follows, then, *ex necessitate rei*, that these courts being endowed with this jurisdiction, and being called upon to exercise it, and the forms and modes of procedure not being pointed out by congress nor by the territorial laws, it remains for these courts to adopt such regulations as the nature of the causes coming before them seems to require, not in conflict with the constitution and laws of the United States or of the territory. This the court may do by general rules applicable to all cases, or by special direction in any given case, or for any particular term, having a care to adopt such means as in their judgment will best secure the ends of justice, protect the rights of the citizen, and give offenders a fair and impartial trial.

It is clearly indicated that this court may pursue this

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course, in the opinion of the supreme court of the United States, in the case of *Hornbuckle v. Tombs*, 18 Wall. 656 (see bottom of page). In that case the court say: From a review of the entire past legislation of congress on the subject under consideration, our conclusion is that the practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves.

The courts of the territory are in some respects *sui generis*. They have a broader and more extensive jurisdiction than state courts, since they are endowed with the same jurisdiction as the district and circuit courts of the United States in all cases arising under the constitution and laws of the United States, with slight exceptions. They have a more extensive jurisdiction than the United States district and circuit courts, as they are clothed with plenary municipal jurisdiction in the territory. They are called upon by the people of the United States to exercise the one, by the people of the territory to exercise the other. In matters necessary to the exercise of this extensive jurisdiction, and not regulated by laws applicable to said courts, it remains for them to adopt such rules and regulations as will enable them to administer justice according to law.

The jury in the case at bar was in every respect a jury from the vicinage, since it was drawn from territory wholly within the district where this crime was committed. It is not pretended that they were selected with a view to secure indictment or conviction, but in every respect good and lawful men.

The third error assigned is in the giving the first instruction offered on the part of the prosecution, and various authorities are cited to sustain the view of appellants. The first series so cited are to the point that preponderance of evidence is not sufficient to convict, in criminal cases. This proposition is not questioned. Second, that an erroneous

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instruction is not cured by afterwards instructing directly to the contrary. This last objection and those that follow are based upon the assumption that the instruction is in itself erroneous. Is this assumption correct? This instruction does not direct the jury to find the defendant guilty. It does not assume to cover the whole case. It is simply a definition of the term robbery, as applied to this case. Robbery is defined in the law to be the felonious taking of the money, goods, or other valuable thing from the person of another, by force or intimidation.

The instruction is: "The jury are instructed that if they believe from the evidence that the defendants feloniously took possession of the United States mail or any part of it by force or intimidation of or from a carrier of the mail, then the offense of robbery was complete."

The court does not instruct the jury that they should then find the defendants guilty, nor that they are guilty, but that the crime of robbery was complete. The court might not only leave out the words, "beyond a reasonable doubt," but you may strike out the words, "if they believe from the evidence that," and the instruction would still be correct and proper. It would then read: "The jury are instructed that if the defendants feloniously took possession of the United States mail or any part of it by force or intimidation of or from a carrier of the mail, then the offense of robbery was complete."

It will be seen that it only defines and specifies what constitutes the crime of robbing the United States mail carrier of the United States mail, with which defendants were charged. It is not "ambiguous," not contrary to the sixth or any other instruction, and not erroneous. The law is that all the instructions given by the court are to be taken together, and it is believed that all instructions given in the case taken together constitute a complete exposition of the law relating thereto.

The fourth objection is, that the offense described in the indictment did not warrant the judgment of the court. The essential words of the statute are, "put his life in jeopardy by the use of dangerous weapons." The rule is, that

Points decided.

the pleader must employ so many of the substantial words of the statute as shall enable the court to see on what statute it is framed, and such other words as are necessary to a complete description of the offense, or words which are their equivalents or more than their equivalents in meaning.

The allegations in the indictment are, when transposed, as follows: The said William Mays and William H. Overholt, each then and there being severally armed with a dangerous weapon, to wit, a gun, with intent to kill, etc., feloniously did make an assault in and upon the said Joseph Goodwin, in bodily fear and danger of his life, then and there feloniously did put. The word jeopardy is defined to be danger, to expose to loss or injury, peril; jeopard is to put in danger, to expose to loss and injury; jeopardize is putting in danger. The word danger is then the equivalent of jeopardy. It will scarcely be contended that the arming themselves with dangerous weapons, and bringing them there, with intent to kill, is not the use of dangerous weapons.

We are of the opinion, that in the trial of this cause there is no error, and the judgment is, therefore, affirmed.

UTAH & NORTHERN RAILWAY COMPANY, APPELLANT, v. WILLARD CRAWFORD, DISTRICT ATTORNEY, RESPONDENT.

PRACTICE.—Under the code of procedure a defendant is not only permitted, but is required to set up all matters of defense, by answer in the original action, whether such matters are legal or equitable in their character.

IDEM—INJUNCTION ENJOINING ACTION AT LAW.—A defendant may not, under the code, bring his separate suit in equity to enjoin the original action at law when his complaint consists of matter defensive to such original action.

DEFINITION OF "DEFENSE."—A defense, in the sense of the code, is a right possessed by the defendant, which, either partially or wholly, defeats the plaintiff's claim.

CONSTRUCTION OF STATUTES.—Remedial statutes are to be construed to prevent a failure of the remedy, and extended to later provisions by subsequent statutes.

EXEMPTION FROM TAXATION.—Subdivision 2 of section 39 of the revenue act applies to all statutory exemptions from taxation.

APPEAL from the third judicial district, Oneida county.

Opinion of the Court—Prickett, J.

Parley L. Williams, for the appellant.

Huston & Gray and Higbee & Smith, for the respondent.

PRICKETT, J., delivered the opinion. MORGAN, C. J., and BUCK, J., concurred.

The plaintiff brought its action in equity to enjoin the defendant as district attorney, and his successors in that office, from further prosecuting an action instituted by him, in the district court of Oneida county, to recover of the plaintiff the sum of two thousand and sixty-eight dollars territorial and county taxes levied and assessed for the year 1878, upon that portion of its railroad line and track, including the rolling stock, depots, and buildings belonging to the same, situate within the exterior boundary lines of Oneida county.

The grounds upon which the injunction is claimed as set forth in the complaint are: 1. That the property assessed, or so much of it as lies in Idaho territory, was exempt from taxation under an act of the legislature approved January 9, 1873. 2. That a portion of the property so assessed is upon the Fort Hall Indian reservation, and therefore without the jurisdiction of the taxing officers of Oneida county, for the reason that said Indian reservation constitutes no portion of the territory of Idaho, or of the county of Oneida. 3. As a reason why this exemption and these facts were not set up by answer in the suit for the recovery of the taxes, that the plaintiff herein was not at liberty to do so under the statutes, but was and is prohibited therefrom by the provisions of section 39 of the revenue law.

The defendant demurred to the complaint on the grounds that it does not state facts sufficient to constitute a cause of action, and that another action is now pending in the same court between the same parties for the same cause. The district court sustained the demurrer, and rendered a judgment dismissing the complaint; from which judgment the plaintiff appealed to this court, and assigns the order sustaining the demurrer as error.

The first question that arises in this case is one of prac-

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tice, for it is an admitted proposition, that if the facts stated in the complaint in this action could have been alleged and proven in defense to the action brought by the defendant for the recovery of the taxes, this action can not be maintained. The question is, therefore, could these facts have been so pleaded and shown? Under the ancient system of practice and pleading the course pursued by the plaintiff in this case would, without doubt, have been correct. Conceding all the facts set forth in the complaint to be true, which for the purposes of the demurrer must be done, the plaintiff would not have been permitted under the old practice to set up equitable matter in defense to the statutory action for the recovery of the taxes, but would have been compelled to institute an independent and separate suit in a court of equity by which it might enforce its equitable right, and in the mean time enjoin the further prosecution of the suit for the taxes. The code of procedure, however, which has been adopted as the rule of practice in this territory, has effected wide and radical changes in that respect. It provides that "there shall be in this territory but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be the same at law and in equity;" that "all the forms of pleadings and the rules by which the sufficiency of the pleadings shall be determined shall be those prescribed in this act;" that "the answer of the defendant shall contain: first, if the complaint be verified, a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof, according to his information and belief; if the complaint be not verified, then a general denial to each of said allegations, but a general denial shall only put in issue the material and express allegations of the complaint; second, a statement of any new matter or counter claim constituting a defense in ordinary and concise language," and that "the defendant may set forth by answer as many defenses and counter claims as he may have," etc.

These provisions abolish the circuitous, tedious, and expensive methods of the common law, and substitute rules

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of pleading and practice, which not only permit, but require, a defendant to set up any and all defenses that he may have, whether legal or equitable in character, by answer in the original action.

A defense to an action or a cause of action in the popular sense of the code, is a right possessed by the defendant, arising out of the facts alleged in his pleadings, which, either partially or wholly, defeats the plaintiff's claim. Considering the complaint of the plaintiff in this action in connection with this definition, it clearly appears that the facts alleged therein were intended for no other purpose than to defeat the claim for the taxes. The claim of the public is, that taxes are due from the railway company, for which judgment and execution is demanded as a remedy. The opposing defense of the railway company is that, under the provisions of an act of the legislative assembly of Idaho territory, the right of exemption from taxation was conferred on the company, and that as the people had no right to tax the property, they are not entitled to the remedy demanded in the action to recover the taxes. The right which the railway company thus claim to be entitled to, and to be in possession of, is clearly, if established, defensive to the claim of the people for the taxes.

But it is insisted by the appellant, that they are prohibited by statute from alleging or claiming exemption from taxation, by answer in the action for the taxes; and therefore they must be permitted to assert their right in equity. If the premises upon which this proposition is based were correct, it would, perhaps, be a sufficient answer to the conclusion of counsel, based thereon, to say, if such exemption can not be alleged by answer, neither can it be allowed to be done by a complaint which contains matter of a defensive nature only, because it would be permitting to be done, indirectly, that which may not be done directly. If the matter contained in this complaint constitutes no defense to the action for taxes, neither does it constitute a cause of action against the people to prevent the recovery of the taxes, after action has been commenced for that purpose.

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But we are not convinced of the correctness of the premises assumed by counsel for the appellant upon this point. The act under which the appellant claims exemption from taxation, was approved January 9, 1873. By section 39 of the act to provide a system of territorial and county revenue, etc., approved January 15, 1875, page 495 of the compiled laws, it is provided that in actions for the recovery of taxes, "the defendant may answer, which answer shall be verified; * * * second, * * * that such property is exempt from taxation under the provisions of section 4 of this act." * * * "And no other answer shall be permitted."

Section 4 of that act does not mention or include any railway, or the property of the appellant. It is said by counsel for the appellant, that inasmuch as it is within the power of the legislature to provide for the collection of taxes in a summary manner, and without suit, that it may limit the defenses to be interposed in an action for the taxes. Be this as it may, upon a careful examination of the history of this statute we find that it was originally enacted and approved February 4, 1864, 1 Session Laws, 412, that it was re-enacted January 13, 1869, 5 Session Laws 39, and that it was carried forward from the fifth session laws, to the compiled laws, and re-enacted January 15, 1875. It must therefore be regarded merely as a continuation of section 39 of the revenue law of the fifth session. At the time of the first enactment of that section, and until the passage of the act under which the appellant claims exemption from taxation, section 4 of the revenue act, designated all the kinds and classes of property excepted or exempted from taxes; so that the words "under the provisions of section 4 of this act," contained in the subdivision of section 39 of the revenue law above quoted, were then meaningless. They did not restrict the answer to any particular kind or class, but all exemptions were allowed in defense notwithstanding those words. The evident intention of the legislature was to allow the defense to be set up in answer to a suit for taxes, in all cases where property was exempt by law, and there is nothing in the fact that these words have been car-

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ried forward to a subsequent compilation, that leads us to conclude that there has been any change of such intention on the part of the legislature.

To impute to the legislature an intention to confer upon parties an abstract right, while withholding all remedy for its enforcement, would be charging it with “keeping the word of promise to the ear, and breaking it to the hope;” in fine, of a gross absurdity. Remedial statutes should always be construed to prevent a failure of the remedy, and extended to later provisions by subsequent statutes, and this case comes clearly within those rules.

The conclusion we thus arrive at, is that the appellant in this case, the defendant in the tax suit, if its property was exempt from taxation for the year 1878, must claim such exemption by answer in that suit, and that the demurrer to the complaint in this action was properly sustained.

The judgment of the district court is affirmed.

**DENNIS DEASEY, APPELLANT, v. W. L. THURMAN,
RESPONDENT.**

ADMISSIONS OF ASSIGNOR—PURCHASER IN GOOD FAITH.—The admissions or statements of the assignor of chattels, in derogation of his title thereto, made prior to his transfer of the same, can not be introduced in evidence against the title of his assignee who purchased the same in good faith, without knowledge of such statements or admissions.

INSTRUCTIONS.—When the court instructs a jury upon what state of facts they must find a verdict for or against the party, the instructions should include all the facts in the controversy, material to the rights of the parties upon the claim of the plaintiff and the defense of the defendant.

APPEAL from the second judicial district, Ada county.

Brumback & Cahalan, for the appellant.

Huston & Gray, for the respondent.

BUCK, J., delivered the opinion. MORGAN, C. J., and PRICKETT, J., concurred.

This action was commenced in the court below for the recovery of certain personal property, to wit, a pack train

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consisting of thirty-seven animals and the necessary equipments. The pleadings were in the usual form in actions under the statute for the claim and delivery of personal property; the plaintiff claiming ownership and alleging wrongful detention by defendant, the defendant admitting possession and claiming ownership by purchase of Con. Haley & Company, a firm composed of Cornelius Haley and Timothy Deasy, and denying wrongful detention. The defendant also pleads specially an estoppel *in pais* against the plaintiff. The trial was with a jury and the verdict for the defendant. The plaintiff appeals from the judgment, and claims error by the court in the rejection of certain evidence, and in giving certain instructions to the jury objected to by plaintiff, and in refusing certain instructions asked for by the plaintiff.

The evidence tends to show that, in A. D. 1869, the plaintiff owned the property in question, and at that time made a conditional transfer thereof to Con. Haley & Co. That pursuant to said transfer said company took possession of said property and exercised full control of the same continuously, and apparently as owner thereof, until the eighth day of July, A. D. 1877. That during all of said time the plaintiff was generally with said train, apparently as the employee of said Con. Healey & Co. That during said time the plaintiff publicly acknowledged the control and ownership of said property to be in said company; that he publicly made no claim to ownership in said property, and did no act indicating ownership in himself, except possibly certain equivocal and isolated acts which might indicate either ownership or servile employment on his part.

The evidence on the part of the defendant tends to show that on the eighth day of July, A. D. 1877, while said Con. Haley & Co. were in the possession and exercising full control and apparent ownership of said property, they sold it to the defendant with the full knowledge of the plaintiff, and that since said sale the defendant had retained possession thereof. The evidence tends to show also that during all the time of the possession of said property by said Con. Haley & Co., the defendant privately claimed the

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ownership of said property, and that at the time of said transfer from Con. Haley & Co. to the defendant, said Timothy Deasey, in making said transfer, acted for said company and also as agent of plaintiff, and that at the time of said transfer the plaintiff knew of, and adopted as his own, the act of said Timothy Deasey in making said transfer.

During the trial the plaintiff offered in evidence the declarations of Con. Haley & Co. while in possession of said property, in derogation of their own title thereto, as against the defendant in this action. The defendants objected to this evidence, and the objection being sustained, the plaintiffs excepted to the ruling of the court, and claim that said ruling was error. The appellant now argues that said evidence was admissible: 1. As a part of the *res gestæ*; and 2. As the declarations of the party under whom defendant claims, while such party was in possession of the property.

To make such evidence admissible as a part of the *res gestæ*, the conversation or admissions must have been concurrent with the contract of transfer, or in some way connected with it, and must have come to the knowledge of the assignee. (1 Greenl. Ev., sec. 110; *Tevis v. Hicks*, 41 Cal. 126; 2 Bouv. L. Dic. 464.) It does not appear that the admissions or statements were made at the time of the transfer, or that they were in any way connected, even remotely, with that transaction, or that they ever came to the knowledge of the defendant, and it seems to have been admitted on the argument of the case that the declarations, desired to be introduced in evidence and rejected, were made at different times more than two years prior to the transfer of the property. Clearly they formed no part of the *res gestæ*. The second ground upon which the appellant claims that such declarations were admissible, namely, as declarations of the assignor while in possession of the property, was very ably and elaborately discussed by the respective attorneys and a large number of authorities cited.

We are able to find, however, no more accurate and lucid discussion of the doctrine relating to such admissions than by Professor Greenleaf (1 Greenl. Ev., sec. 190). From it

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and the authorities cited on the argument, we are able to state the correct rule to be, that the admissions of the assignor of chattel property can only be received in evidence in disparagement of the title of the assignee when there is an identity of interest between the assignor and assignee, and that such identity exists in the transfer of chattels, only where the assignee has purchased the same with actual notice of the true state of the title of the assignor, or under such circumstances of suspicion as should lead him to make special inquiry into the title of the assignor. (*Paige v. Cogwin*, opinion of Senator Lot, 7 Hill, 379.)

There is clearly no such circumstance of suspicion in the case at bar, or such an identity of interest between an assignor of a chattel and his assignee without notice, as is contemplated in the authorities that sustain the admission of such evidence. To hold that an assignee of chattel property could be affected by the declarations of his assignor made before the transfer, and of which he had no knowledge, would be most disastrous to the commercial interests of the country.

Upon the submission of the cause to the jury the plaintiff requested the court to give the following instruction, to wit: "The defendant claims title in his answer from Con. Haley & Co. He must be confined to this source in acquiring title. He can not set up title derived from Con. Haley & Co., and prove title from the plaintiff in this action. If you find that the defendant did not purchase of Con. Haley & Co., you will find in favor of the plaintiff." This instruction was refused, and the ruling of the court thereon is claimed by the appellant to be error.

The instruction asked for is objectionable on several grounds. It is founded upon an assumption of fact not sustained by the evidence or the pleadings. The defendant does not claim to derive title from the plaintiff or from any other than Con. Haley & Co. The instruction was probably suggested by certain cross-interrogatories put to plaintiff by defendant, the answers to which tended to show that the plaintiff recognized Timothy Deasey as his agent as well as the agent of Con. Haley & Co., in selling the pack train to de-

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fendant, and that the plaintiff with full knowledge approved the sale. While the effect of such evidence, if given, would undoubtedly show that the plaintiff had sold whatever interest he had in the property, and therefore defeat his recovery in this action, yet it could not therefore be alleged that the defendant claimed title from any other parties than as alleged in the answer.

The instruction is also objectionable for the reason that it instructs the jury to find a verdict for the plaintiff upon a failure of defendant to prove a purchase from Con. Haley & Co., thus transferring the burden of proving title from the plaintiff to the defendant. In this class of cases the plaintiff rests upon the strength of his own rather than on the weakness of the defendant's title.

It is further objectionable as including only a portion of the facts essential to a recovery by the plaintiff. "Where the court instructs a jury upon what state of facts they must find a verdict for a party, the instructions should include all the facts in the controversy material to the rights of the plaintiff or the defense of the defendant." (*Gallagher v. Williamson*, 23 Cal. 334.)

The court gave the following instruction for the defendants: "If the jury find from the evidence that Tim. Deasey, as the agent of the plaintiff, made a sale of the pack train in question to the defendant, then the plaintiff can not recover in this action, and the verdict must be for the defendant." To this instruction the plaintiff excepted, and now claims the same to be error.

The plaintiff's right to recover rests, as we have before said, to his title to the property, and if, through his agent or otherwise, he had sold the property, he could not recover. The instructions seem to be in strict conformity to the law regulating this class of cases.

The exceptions taken at the trial to certain other instructions were not strongly urged on the argument, nor expressly abandoned; but we find no error either in the rulings of the court or in the instructions to the jury, and the judgment is therefore affirmed.

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EDWARD GRAHAM, ADMINISTRATOR, APPELLANT, v.
NORA LINEHAN, ADMINISTRATRIX, RESPONDENT. /

PRACTICE—NON-APPEALABLE ORDERS—BILL OF EXCEPTIONS.—Interlocutory non-appealable orders in an action can not be reviewed on appeal without being incorporated into a bill of exceptions, and brought up with the judgment roll, and thus made a part of the record.

JUDGMENT ROLL—WHAT CONSTITUTES.—The papers constituting the judgment roll are specified in section 221 of the civil practice act. Papers not enumerated therein can not properly be inserted in the transcript, and if placed there, can constitute no part of the record.

REVIEW ON JUDGMENT ROLL.—On appeal from a final judgment, if the record contains no bill of exceptions or statement, the case must be reviewed and decided upon the judgment roll alone.

APPEAL from the second judicial district, Owyhee county.

Edward Nugent, for the appellant.

R. Z. Johnson and Brumback & Cahalan, for the respondent.

BUCK, J., delivered the opinion; MORGAN, C. J., and PRICKETT, J., concurring.

This action was commenced in the court below on certain promissory notes and accounts. During the pendency of the action both the original parties died and their representatives were substituted for them. At the commencement of the action a writ of attachment was issued and a levy made under it on certain property of the defendant. The lien of the writ was existing at the time of the death of the defendant. The pleadings in the case are a complaint and supplemental complaint on the part of the plaintiff, and a demurrer on the part of the defendant. No answer was filed in the case, and at the trial the defendant appeared in court and stated that she had no defense to make. A part of the supplemental complaint was stricken out on motion of the defendant, but the record does not show the grounds upon which the motion was granted. Decision was rendered for the plaintiff, and a motion made in his behalf asking that judgment be so entered that the attachment lien should continue and the property seized under the levy should be applied to the payment of this judgment, to the

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exclusion of other debts of the defendant deceased. The court overruled the motion, and judgment was entered under the ruling of the court, making the judgment payable in due course of administration. The appeal is taken from this final judgment for the purpose of so changing its character as to give it a preference over other debts of the deceased defendant.

No exception was taken to the order of the court overruling the motion of the plaintiff as to the character of the judgment, and the appellant relies for relief upon his appeal from the final judgment alone. No bill of exceptions or statement appears in the transcript, and the record furnished to the court consists simply of the judgment-roll. The transcript contains copies of the notice of motion to strike out a part of the supplemental complaint and the order granting the same. But these papers properly form no part of the judgment-roll, and being improperly within the transcript, must be treated as of no effect. (*Sutler v. San Francisco*, 36 Cal. 114; *Sharp v. Daugney*, 33 Id. 513.)

The order to strike out a part of a pleading is an interlocutory, non-appealable order, and to be reviewed on appeal should be incorporated into a bill of exceptions, and made a part of the record. (*Abbott v. Douglass*, 28 Cal. 295; *Dimick v. Campbell*, 31 Id. 240; *Morris v. Angle*, 42 Id. 240; *Freely v. Shirley*, 43 Id. 370; *Idaho World Printing Co. v. Geo. Ainslie*, ante, 641; *Harper v. Miner*, 27 Cal. 107; *Sutler v. San Francisco*, supra; *Wethered v. Carroll*, 33 Cal. 549.)

In the case at bar, there being no statement or bill of exceptions, the appeal must be decided on the judgment-roll alone. (*Wethered v. Carroll*, supra; *McAbee v. Randall*, 41 Cal. 137; *Douglass v. Dakin*, 46 Id. 49; *Karth v. Orth*, 10 Id. 193; *McGill v. Rainaldi*, 11 Id. 391.)

In the able and exhaustive brief submitted by the appellant, it is claimed that errors appearing in the judgment-roll may be corrected on appeal without a statement, and references to California decisions are made to sustain this theory. But in the California code bills of exceptions are incorporated in the judgment-roll, while in our code bills of exceptions do not form a part of the judgment-roll. In

Points decided.

California, any error appearing in the bill of exceptions could be corrected on appeal from the final judgment, because the errors appeared in the judgment-roll; but in the Idaho code, the errors which should appear in the bill of exceptions do not form a part of the judgment-roll, and therefore form no part of the record, unless the bill of exceptions is brought up with the judgment-roll. Section 448 of chapter 28 of our civil practice act provides that the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case upon which the appellant relies.

In our practice, then, the bill of exceptions does not necessarily come up on appeal, because it forms no part of the judgment-roll, while in the California practice it does.

In the case at bar, there is no bill of exceptions or statement, and looking to the judgment-roll alone, the judgment seems to be in strict conformity with section 142, chapter 6, of our probate practice act, and is, therefore, affirmed.

JOHN C. FOX, APPELLANT, v. W. W. WEST AND M.
G. LUNEY, RESPONDENTS. /

"ADVERSE PARTY" DEFINED.—The term "adverse party" in section 201 of our civil practice act has the same signification as to matters deemed excepted to as the term "aggrieved party," in section 436 of the same act.

PRACTICE—EXCEPTIONS.—The exceptions which, by section 201 of the civil practice act, the adverse party is deemed to have taken, have the same force and effect in the conduct of the action as other exceptions taken during the trial, and can not be considered on appeal without being incorporated into a bill of exceptions, and thus made a part of the record.

RELIEF OBTAINABLE IN COURT BELOW.—Any relief sought which is attainable in the court below can not be granted in the first instance, in the appellate court.

APPEAL from the second judicial district, Boise county.

F. E. Ensign, for the appellant.

Huston & Gray, for the respondents.

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BUCK, J., delivered the opinion; MORGAN, C. J., and PRICKETT, J., concurring.

This action is brought on a joint and several promissory note given to plaintiff, as payee, by defendants, and one R. W. Thompkins. Only West and Luney were made parties defendant, the joint maker, Thompkins, having died prior to the commencement of the action. Defendant West made default, and Luney filed his separate answer, alleging among other things full payment of the note. The cause was tried with a jury on the issues joined, and a verdict was rendered in favor of the plaintiff, against both defendants, as prayed for in the complaint, for the sum of one hundred and twenty-six dollars and sixty-eight cents. Judgment was entered for the amount found due against the defendant without designating which one.

Appeal is taken from final judgment, and the errors alleged are: 1. That the jury erred in finding a verdict against both defendants, the plaintiff claiming that the verdict should have been separate against defendant Luney for the amount found due on the note, leaving the plaintiff at liberty to enter a separate judgment against defendant West on default for the full amount. 2. That the court erred in receiving the verdict and entering judgment.

No bill of exceptions or statement was brought up in the record, and the appellant relied on the exception to the verdict served to the "adverse" party by section 201 of chapter 14 of our civil practice act, and claimed that said exceptions could be considered on the appeal without being incorporated into a bill of exceptions and thus made part of the record. The signification of the word "adverse" in said section was also argued, and whether in contemplation of our statute, a party having obtained a verdict in his favor, but with which he was not satisfied, would be an "adverse" party to whom an exception under said section would be saved. The court is of the opinion that the term "adverse party" in section 201, chapter 14 of our civil practice act, has the same signification as to matters "deemed excepted to" as the term ag-

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grieved party in section 436 of chapter 28 in taking an appeal, and that any party aggrieved by any decision can avail himself of the exceptions given by said section.

But before said exceptions can be considered on appeal, they must have been incorporated into a bill of exceptions, and thus made a part of the record. In this respect there is, in our practice, no distinction between exceptions saved by the statute and other exceptions taken at the trial. (*Idaho World Printing Co. v. George Ainslie, ante, 641.*)

As to the first error claimed by appellant, to wit, the character of the verdict of the jury, and the reception thereof by the court, there seems to have been no objection whatever at the trial, either to the verdict itself or the reception of it by the court. Section 179 of chapter 13 of our civil practice act provides for the correction, by the jury, under the advice of the court, of informal or insufficient verdicts, and section 208 of chapter 15 of said act provides for a new trial in case the verdict is contrary to law or is not justified by the evidence. No objection was made to the verdict either by motion to correct it or for a new trial. The plaintiff having acquiesced in the verdict, can not object to it in the first instance in the appellate court. (*Perkins v. Wilson & Garretson, 3 Cal. 137; Hicks v. Coleman, 25 Id. 146; Duff v. Fisher, 15 Id. 380.*)

As to the third and fourth assignments of error, section 215 of chapter 16 of our civil practice act requires the clerk to enter judgment in conformity to the verdict, and unless the aggrieved party takes the necessary steps to correct it, it was clearly his duty to do so.

If the judgment as entered is irregular as embracing too many parties, the proper practice is to move to correct it in the court below. (*Mulliken v. Hull & Co., 5 Cal. 246; De Castro v. Richardson, 25 Id. 53; Morrison v. Dopman, 3 Id. 257; Roussel v. Boyle, 45 Id. 64.*)

The second assignment of error by plaintiff, namely, that the court erred in refusing to enter judgment against West for the sum claimed in the complaint, seems not well taken, as the record does not show, and it was not contended on

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the argument that the plaintiff ever asked, that defendant West be defaulted or that judgment be entered against him.

We find nothing in the record that would authorize the court to interfere with the judgment below, and it is therefore affirmed.

H. SQUIER, APPELLANT, v. B. LOWENBERG ET AL.,
RESPONDENTS.

FINDINGS—PRESUMPTIONS.—In the absence of findings of fact from the record in a cause tried by the court without a jury, the presumption is that they were waived. If not, that fact should appear affirmatively.

APPEAL from the first judicial district, Nez Perce county.

Huston & Gray, for the appellant.

Respondents made no appearance.

PRICKETT, J., delivered the opinion; MORGAN, C. J., and BUCK, J., concurring.

The cause was tried by the district court without a jury, and judgment was rendered in favor of the defendants for their costs. The record brought to this court consists of the judgment-roll, in which there is no finding of fact, and the appellant seeks to reverse the judgment on that ground, and urges the decision in the case of *Estell v. Chenery*, 3 Cal. 467, and others of like import, in support of his position. When those decisions were rendered by the supreme court of California, the statutes of that state required, without exception, in all cases tried by the court without a jury, that findings of fact should be filed. Our statute, section 188 of the civil practice act, provides that “findings of fact may be waived by the several parties to an issue of fact: 1. By failing to appear at the trial. 2. By consent, in writing, filed with the clerk. 3. By oral consent, entered in the minutes.”

This statute, as will be seen, does not absolutely or unconditionally require that findings of fact shall be filed in all cases, but only that they must be filed unless waived in

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one of the methods therein mentioned. It is a familiar rule that upon an appeal taken, error is not to be presumed, but must affirmatively appear from the record. Where, therefore, as in this case, a cause is tried by the court without a jury, and the appeal is taken upon the judgment-roll alone, the absence of findings of fact from the roll does not establish that error was committed. Under the rule referred to, we can not presume that the findings were not waived; the necessary intendment in support of the judgment is the other way. We must presume that they were waived under the statute. A party, therefore, who comes to this court to allege that the court below committed error in rendering judgment without finding the facts, must, by bill of exceptions, make it affirmatively appear by the record, that he did not waive findings in the court below, otherwise the presumption here must go to support, and not to overthrow, the judgment rendered there.

The judgment is affirmed.

LORAIN B. MORGAN, RESPONDENT, v. J. N. IRELAND AND H. H. MIFFLIN, APPELLANTS.

DOWER.—Our statute has abolished dower, but has substituted more liberal provisions in its stead.

REVOCATION OF WILL.—Whenever new moral and testamentary duties arise subsequent to the execution of a will, the will is revoked by presumption or operation of law, unless the objects of those duties are provided for, either by the law or the will.

APPEAL from the third judicial district, Oneida county.

Higbee & Smith, for the appellants.

Huston & Gray, for the respondent.

PRICKETT, J., delivered the opinion; MORGAN, C. J., and BUCK, J., concurring.

On the sixth day of August, 1878, Morgan M. Morgan, late of Oneida county in this territory, made his last will,

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whereby he disposed of his entire estate, both real and personal, to his children. At that time he was a widower, and the father of several children by a previous marriage. On the thirteenth day of October in the same year, he intermarried with the plaintiff; and on the twenty-fifth day of February, 1879, he died. He left, surviving him, a widow—the plaintiff above named—and the children of the former marriage. On the third day of April, 1879, the will was admitted to probate in the probate court of Oneida county, and the defendants were appointed executors thereof. On the seventeenth day of September, 1879, the plaintiff petitioned the probate court to set aside the will, on the ground that it was, presumably, revoked. The probate court denied the petition and dismissed the same; from which judgment the plaintiff appealed to the district court of the third judicial district in and for Oneida county; which last named court, on the third day of May, 1880, rendered its judgment reversing the judgment of the probate court and declaring the will revoked, and annulling the probate thereof and the letters testamentary issued thereon. From the judgment of the district court the executors appealed to this court.

The only question in the case is, do the facts above stated imply a revocation of the will? or in other words, does the marriage of a man, under the circumstances of this case, by operation or presumption of law revoke a will previously made?

We are without any statute on the subject of revocation of wills, and are therefore to be governed in the decision of this question by the principles of the common law, as settled by the adjudications of the English and American courts—that law having been adopted by our legislature as the law of this territory, when not in conflict with statutory provisions.

It is laid down as a rule, in the most, if not all of the English cases in which the question has been considered, that marriage, without the birth of issue, does not operate to revoke a precedent will. There are, also, numerous decisions by the English courts on the question whether the subsequent birth of a legitimate child alone will have

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that effect; in some of which it is held that it will, and in others to the contrary; in some that it operates as a revocation of the will as to the personal estate alone; and in others that it has that effect, both as to real and personal property. But it must be borne in mind that the reasons given by the English courts for their decisions upon these questions are based, principally, upon the existence of the common law right of dower and upon the English law of primogeniture, neither of which exists here. The English rule and the reasons therefor are very concisely stated by Greenleaf in his valuable work on evidence, vol. 2, par. 684, as follows:

“In regard to implied revocations, these are said to be founded on the reasonable presumption of an alteration of the testator’s mind, arising from circumstances since the making of the will, producing a change in his previous obligations and duties. A subsequent marriage alone, if the testator was a *feme-sole*, will always have this effect, even though she should survive her husband; for by the marriage her will ceased to be ambulatory, and was therefore void. But the marriage of a man is not alone a revocation of his will; for the common law has made sufficient provision for the wife by her right of dower. Nor is the birth of a child, after the making of a will, in itself, and independent of statutory provisions, a revocation of a will made subsequent to the marriage; for the testator is presumed to have contemplated such an event. But a subsequent marriage and the birth of a child, taken together, are held to be a revocation of his will, whether of real or personal estate, as they amount to such a change in his situation that he could not intend that the previous disposition of his property should remain unchanged.”

The reason of the law is its essence and soul, and here we have laid down the very good reason why the marriage of a man is not, alone, the revocation of his will; that the common law has made sufficient provision for the wife by her right of dower. But our statute has entirely abolished the common law right of dower, and the reason given by Greenleaf and the English courts, for the rule established by

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them, wholly fails here. When the reason for the rule does not exist, the rule itself must fail also.

But by our statutes more liberal provisions for the widow have been substituted in place of the abolished dower right. They provide that the widow shall be entitled to a half interest in the common property, consisting of that acquired after marriage by either husband or wife, except such as is acquired by gift, bequest, devise, or descent; and if there be more than one child living, as in this case, one third of the separate estate of the deceased husband shall be inherited by her. It gives to the surviving husband or wife, one half of the common property in his or her own right, upon the assumption that each has contributed equally to its acquisition, and, by inheritance, one third of the separate estate of the deceased; thus making either spouse heir to the other.

These rights having been given by statute, in lieu of dower, it is difficult to understand upon what principle they are less sacred, in the eyes of the law, than the common law right to dower itself, where it exists; or why the husband should be permitted to dispose of those rights by ante-nuptial will, so as to defeat the beneficent objects and purposes of the statute any more than he could, by such means, convey the dower right away from the widow.

After a full and careful examination of the authorities cited by the appellant's counsel in this case, we find the fundamental rule, which underlies them all, and which serves as their foundation and ground-work, to be, in brief, that whenever new moral testamentary duties arise subsequent to the execution of a will, it is presumed that it is the mind and intention of the maker to discharge those duties, and the will is said to be revoked by operation or presumption of law; unless indeed the objects of those new duties are provided for, either by the law, or the will itself. This, we think, is the reason upon which all the decisions, both English and American, are based; and is the law which the courts have administered. When, therefore, the courts of England have said that subsequent marriage, without issue, does not work a revocation, they have in effect said that the

Points decided.

facts of such a case do not bring it within the law, because the law of dower here makes provision for the wife.

It certainly will not be claimed that the wife is not a meritorious object of the husband's duty and bounty, or that she is less so than the children by the former marriage. This case unquestionably comes within the rule that we have laid down as the law in such cases. By the marriage of the deceased Morgan M. Morgan to the plaintiff, new moral and testamentary duties arose, requiring him either to make due provisions for her by will or to leave her to the inheritance provided by law. The law will not presume that he intended to avoid those duties, or that he would willingly leave her disinherited, unprovided for, and dependent upon charity. On the contrary, the presumption is, that after his marriage, his intention to die testate under the will in question was changed. And we hold, that his marriage wrought such a change in his previous obligations and duties, as revoked his will by presumption of law.

The judgment of the district court is affirmed.

THE BOISE CITY CANAL CO., RESPONDENTS, v. EBEN AND JOSEPH PINKHAM, APPELLANTS.

CORPORATION—CONDITION PRECEDENT.—If section 1 of an act of the legislature declare certain persons therein named to be a corporation, and in a subsequent section require such corporation, within a certain time thereafter, to give a bond, the giving of such bond is not a condition precedent to the investment of the persons so named with corporate rights and power.

CORPORATIONS, ORGANIZATION OF—QUESTIONING REGULARITY OF.—Individuals can not, in collateral suits, avail themselves of any defects in the organization of a corporation. This may be done only by the power creating them in a direct proceeding instituted for that purpose.

APPEAL from the second judicial district, Ada county.

Huston & Gray, for the appellants.

Brumback & Cahalan, for the respondent.

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MORGAN, C. J., delivered the opinion. PRICKETT and BUCK, JJ., concurred.

This was an action brought by the Boise city canal company against E. and J. Pinkham, to recover the value of water furnished by complainant to defendants, during the years 1876, 1877, and 1878.

There is no question raised as to the use of the water by the defendants, that it was furnished by complainants, that its value was the sum of two hundred dollars. All these facts are admitted. The final error assigned by counsel is that the court erred in holding that the act of January 12, 1866, page 241, 3 Session Laws of Idaho, was valid, and that said act invested the plaintiff with any corporate rights.

The second error assigned is that the court erred in holding that the filing of the bond required by section 10 of said act was not a condition precedent to the investment of the plaintiff with any corporate rights or power. Plaintiff is declared to be a corporation by the first section of the act referred to. There are no conditions precedent, and having been so declared, it can not be shown in defense to a suit by such corporation that it has forfeited its rights by no misuser or non-user. Individuals can not avail themselves of any defect in organization of a corporation in collateral suits. This must be taken advantage of by the power creating them. (Angell & Ames on Corporations, sec. 636, 10th ed., and numerous cases there cited.) Even a condition precedent can only be inquired into by the sovereign power. (Id., sec. 80, and cases cited.) This corporation having been declared such by act of the legislature, it is sufficient for all purposes within its charter. (Id. sec. 83.)

The objection made by counsel that because the legislature assumed control over the streets of Boise city, which control was by a former act granted to said city, the act itself is void, is not tenable. The legislature has power to vacate streets, or direct the laying out of new ones, and it must be held to have the power to permit the use of them for certain purposes, as canals, ditches, railways, etc. The said incorporation act being valid, and giving such corpo-

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ration power and authority to construct such ditch or canal, furnish water, etc., it follows as a natural sequence that the corporation can recover pay for the water so furnished.

The said corporation being declared to be in existence by virtue of the act of January 12, 1866, the admission of the testimony as to the organization under the general incorporation laws of the territory was of no advantage to complainants, and worked no injury to defendants, and therefore can not be held to be error.

The foregoing conclusions having been arrived at by the court, it is deemed unnecessary to consider other objections raised by appellant.

The judgment of the court below is affirmed.

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ABANDONMENT.

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2. **MINING CLAIM—REPRESENTATION BY WORK.**—The failure to perform the work in a mining claim required by law, amounts to an abandonment of the claim, and thereupon it may be occupied by another. *Kramer v. Settle*, 485.
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The initials "U. S." occurring in the title of an action by the people, is a technical defect, which does not affect the substantial merits of the cause, and hence should be disregarded. *People v. Sloper*, 158.

ACCOUNT STATED.

The stating of an account is in the nature of a new promise, depending for its validity upon the consideration of the old debt; but the evidence of such promise must be in writing, or the action will be barred by the statute of limitations. *Reed v. Smith*, 533.

ADMISSIONS.

1. **CONTAINED IN PLEADINGS.**—Written admissions of the defendants in their original answer are still admissions tending to establish the facts thus admitted, and are as much evidence to be considered as any other admissions, notwithstanding they were stricken out on defendant's own motion. *Bloomingtondale v. Du Rell*, 33.

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in it, is evasive. A failure to deny, specifically, each and every material allegation of a verified complaint, admits the allegations not so denied. *Norris v. Glenn*, 590.

3. INSTRUCTIONS.—It is error for the court to instruct the jury that it is necessary for the plaintiff to prove facts alleged in the complaint and not denied by the answer. The failure to deny a material allegation contained in a complaint, is an admission of it; and the admission is conclusive evidence of the fact admitted. *Lillienthal v. Anderson*, 673.

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AMENDMENT.

1. BY ADDING PARTIES.—The district court has the right at any time to call in other parties, or to cause the proceedings to be amended in that particular by striking out or adding the names of any parties, which may be necessary to accomplish the ends of justice and secure the interests of all. *Oro Fino M. Co. v. Cullen*, 113.
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APPEAL.

1. ERRORS APPARENT FROM THE RECORD.—The party appealing brings his whole case before the appellate tribunal, and the whole record is there for review, and he may challenge any part of it as erroneous. *People v. Du Rell*, 44.
2. CLERK'S CERTIFICATE.—The certificate of the clerk of the district court that the "judgment has been duly appealed" will not cure any defects in the record. It is for the court to determine that question from the record. *Moore v. Koubly*, 55.
3. NOTICE OF.—A party appearing generally in a case on appeal in this court, thereby waives all informalities in the notice of such appeal, or want of service of the same. *Id.*
4. WHEN THERE IS SUFFICIENT IN A COMPLAINT TO SUPPORT A JUDGMENT, notwithstanding it may be defectively stated and open to demurrer in the first instance, still if the judgment thus rendered be not excepted to, the appellant has lost his rights, and can not reverse the judgment, however patent the error. *Lamkin v. Sterling*, 120.
5. PRACTICE—EXCEPTIONS.—No exceptions having been taken to the ruling of the court below, we can only look into the judgment roll so far as to see if it will support a judgment. *Smith v. Sterling*, 128.
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judgment, an appeal from such order will be dismissed. *Goodman v. Minear M. & M. Co.*, 131.

See TRANSCRIPT ON APPEAL.

8. **ASSIGNMENT OF ERROR—PRACTICE.**—The supreme court will not scrutinize a voluminous transcript to ascertain whether the inferior court may possibly have committed some error to the prejudice of the complaining party, unless it should first have been assigned. *Feirbaugh v. Master-son*, 135.
9. **DAMAGES ON.**—Affidavits can not be read in support of a motion for damages for failure to prosecute an appeal. There is no question of the right of this court to allow damages in cases where appeals have been taken merely for delay, and no transcript ever called for. *Cady v. Scaniker*, 168.
10. **MODIFICATION OF JUDGMENT—JUDGMENT.**—In cases on appeal where there is no issue of fact, this court will order the judgment of the court below corrected if erroneous in some particular matter only; or reverse it and order the proper judgment to be entered by the court below. *Betts v. Butler*, 185.
11. **REVIEW—JUDGMENT ROLL.**—In cases where no motion for a new trial was made in the court below, or where there is no statement properly made on such motion, the appellate court will only examine the judgment roll, and if this be regular, the judgment will be affirmed. *Purdy v. Steel*, 216.
12. **STATUTE OF LIMITATIONS.**—The statute of limitations can not be raised in the supreme court for the first time, as upon a general demurrer to the complaint. It must be taken advantage of in the court below, by answer or demurrer. *Kraft v. Greathouse*, 254.
13. **STATUTE OF FRAUDS.**—The statute of frauds must be pleaded in the court below, or it can not be considered upon appeal. *Id.*
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17. **RECORD—NOTICE OF—PRACTICE.**—An appeal is taken by filing and serving notice thereof, as required by statute, and the record on appeal must show that such notice was so filed and served, or the case will be dismissed out of this court for want of jurisdiction. *People v. Lynch*, 358.
18. **WRITS OF ERROR.**—A writ of error is the proper mode of bringing before this court, for review, actions at law; and suits in chancery must be brought up by appeal. *United States v. Gilson*, 364.
19. **A COMMON LAW ACTION** can not be re-examined in this court on appeal, but must be brought up by writ of error. *Id.*
20. **PRACTICE—NOTICE OF APPEAL—UNDERTAKING ON APPEAL.**—Three things are necessary in order to perfect an appeal, and to give the su-

- preme court jurisdiction. 1. A notice of appeal must be filed as required by law. 2. A copy of the notice must be served on the adverse party or his attorney. 3. An undertaking must be filed within five days after filing notice of the appeal. *Shissler v. Crooks*, 369.
21. **UNDERTAKING—PRACTICE.**—If an undertaking on appeal is filed before the notice of appeal is filed and served, the appeal will be dismissed on motion. *People v. Hunt*, 371.
22. **WEIGHT OF EVIDENCE—VERDICT.**—When there is some evidence to sustain each of the material questions upon which a jury is bound to find in order to support a verdict, this court ought not to disturb the verdict, even if the court would have found differently on any or all of the issues. *Cox v. N. W. Stage Co.*, 376.
23. **JUDGE AT CHAMBERS.**—An appeal lies from the judgment of a district judge at chambers. *People v. Lindsey*, 394.
24. **APPEALABLE ORDER.**—An order overruling a motion for a stay of proceedings under a void judgment may be appealed from, or brought to this court for review, by writ of error; and such appeal brings under review the whole record in the case. *Alexander v. Leland*, 425.
25. **EXCEPTION.**—If a party desires to have a decision of the district court reviewed by this court, he must except thereto when the ruling or decision is made; and he must also preserve and bring up such exceptions by bill of exceptions or statement. *People v. Hunt*, 433.
26. **LAW OF A CASE.**—A decision of the supreme court in a given case, even although it be erroneous, becomes the law of the case upon the points involved, and can not be reviewed, altered, or changed upon a subsequent hearing in this court. *Lindsay v. People*, 438.
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28. **EXCEPTIONS—STATEMENT.**—If it does not appear from the statement made on a motion for a new trial, that any exceptions were taken at the trial to any ruling of the court, the statement is useless on an appeal from the judgment. *Id.*
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30. **STATEMENT—BILL OF EXCEPTIONS—PRACTICE.**—Upon an appeal from a judgment without a statement or bill of exceptions, nothing can be considered except the judgment roll; and if no error appear therein, the judgment will be affirmed. *Id.*
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- See **NEW TRIAL**, 5, 6.
32. **EVIDENCE—CONFLICT—NEW TRIAL.**—The appellate court will not disturb a judgment or verdict, or order denying a new trial, where there is a substantial conflict in the testimony, and no rule of law appears to have been violated. *Mootry v. Hawley*, 543.

33. STATEMENT ON—AUTHENTICATION.—An agreement by the respective parties to an action that a certain document is the statement in the case, is, substantially, an agreement that such statement is correct. *Moore v. Taylor*, 583.
34. IDEM.—An intelligible and definite reference, in a statement, to papers and exhibits, by letters or numbers, as attached to and constituting a part of the statement, is sufficient, without any incorporation of the same at length into the statement. *Id.*
35. IDEM.—Where affidavits, depositions, or minutes of the court are incorporated into a statement, either in *hæc verba* or by appropriate reference, it is unnecessary to have any further identification of them. *Id.*
36. NOTICE—PRACTICE.—An appeal to the supreme court can not be taken except by filing the notice thereof with the clerk, and serving a copy thereof upon the adverse party or his attorney. *Slocum v. Slocum*, 589.
37. SERVICE OF NOTICE.—The service of the copy of a notice of appeal must be contemporaneous with, or after the filing of the notice; hence, the service upon the adverse party before the filing of the notice is not a sufficient service. *Id.*
38. JURISDICTIONAL FACTS.—The filing of the notice of appeal and the service of a copy thereof are jurisdictional facts, and go to the right of appeal. *Id.*
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41. NOTICE OF—SERVICE—JURISDICTION.—In order to give this court jurisdiction of a case, on an appeal, it is necessary that the transcript should show that the notice of appeal has been served on the adverse party. Unless the record shows such service the appeal will be dismissed. *Anderson v. Knott*, 626.
42. REGULARITY OF PROCEEDINGS MUST APPEAR—PRESUMPTIONS.—The regularity of the proceedings by which an appeal is taken must be shown affirmatively. Nothing will be presumed in favor of the same. *Id.*
43. UNDERTAKING ON.—The undertaking on an appeal must be filed within five days after the service of the notice of appeal, unless a deposit of money be made instead, or the undertaking be waived by the adverse party in writing. *Id.*
44. STATEMENT—BILL OF EXCEPTIONS—PRACTICE.—Where there is no statement of the case or bill of exceptions, and the pleadings warrant the verdict and judgment, this court can not disturb the judgment; but must affirm the same. *Hyde v. Harkness*, 638.
45. REVIEWING VERDICT.—Upon an appeal from a judgment the court may review the verdict of the jury, if excepted to, and the evidence upon which such verdict is based. An exception to the verdict, on the ground that it is not supported by the evidence, can not be reviewed on an appeal from the judgment, however, unless the appeal is taken within sixty days after the rendition of the judgment. *Ainslie v. Idaho World Printing Co.*, 641.

46. **CONFLICT OF TESTIMONY.**—When this court find upon a review that there is a substantial conflict of testimony, it will not disturb the decision of the court below refusing a new trial. If the testimony consist wholly of depositions, the rule is different, but not when a considerable portion was oral. *Id.*
47. **UNDERTAKING ON.**—If the undertaking on appeal is filed before the notice of appeal is served, the appeal is not effectual for any purpose, and it must be dismissed. *Clark v. Lowenberg*, 654.
48. **COMPLAINT—OBJECTIONS TO.**—Where a party shows no right to recover, objections to the complaint or other pleading may be taken for the first time in the appellate court; and where a party shows no right to recover under any possible state of proof, the court is not bound to submit the case to a jury. *Gorman v. County Commissioners*, 655.
49. **REMANDING CASE.**—When the appellate court is in possession of all the rights of the parties, and can render full and complete justice, it will not remand the case for further litigation. *Id.*
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52. **JUDGMENT BY DEFAULT.**—No distinction exists, as to the right of appeal, between judgments entered by default by the clerk, and those rendered after trial upon issues joined. An appeal lies from a judgment in either case within one year after its rendition or entry. *Hardiman v. S. Chariot M. Co.*, 704.
53. **RECORD ON.**—On appeal from a judgment, without a statement or bill of exceptions, nothing belongs to the record except the judgment roll, and no question outside of the record can be considered by this court. *Ray v. Ray*, 705.
54. **DAMAGES.**—The word “damages” as used in the United States statutes, concerning *supersedeas* bonds on writ of error and appeal to the supreme court of the United States, includes the loss which the defendant in error or appellee may sustain by reason of not having the judgment appealed from paid or executed. *Id.*
55. **UNDERTAKINGS—DISMISSAL.**—If an appeal is taken from the judgment, and also from an order refusing a new trial, and an undertaking is given “on such appeal” without stating upon which appeal it is given, the appeals will be dismissed for want of a proper undertaking. *Mathison v. Leland*, 712.
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58. **ERRORS WHICH DO NOT PREJUDICE.**—For errors and defects in the plead-

- ings and proceedings, which do not affect the substantial rights of the party complaining, a judgment will not be reversed. *Id.*
59. RECORD—BILL OF EXCEPTIONS—STATEMENT—ASSIGNMENT OF ERRORS.—When a transcript on appeal in a criminal case contains no bill of exceptions or statement, and no assignment of errors, there is nothing for the consideration of the appellate court, but the indictment, the minutes, and the instructions. *People v. O'Conner*, 759.
60. DISMISSING.—If the record shows no notice of appeal, and it does not, in some way, affirmatively appear that a proper notice has been filed in the office of the clerk of the court below, the appeal will be dismissed. *Caldwell v. Ruddy*, 760.
61. PRACTICE—NON-APPEALABLE ORDERS—BILL OF EXCEPTIONS.—Interlocutory non-appealable orders in an action can not be reviewed on appeal without being incorporated into a bill of exceptions, and brought up with the judgment roll, and thus made a part of the record. *Graham v. Linahan*, 780.
62. JUDGMENT ROLL—WHAT CONSTITUTES.—The papers constituting the judgment roll are specified in section 221 of the civil practice act. Papers not enumerated therein can not properly be inserted in the transcript, and if placed there, can constitute no part of the record. *Id.*
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64. RELIEF OBTAINABLE IN COURT BELOW.—Any relief sought which is attainable in the court below can not be granted in the first instance, in the appellate court. *Fox v. West*, 782.

APPEARANCE.

1. WAIVER.—A party appearing generally, in a suit or proceeding, thereby cures whatever defects may exist in the original process to bring him into court. *Moore v. Koubly*, 55.
2. A voluntary appearance in an action is as effectual for any purpose as due service of process. *Id.*
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ASSESSMENT.

See TAXES AND TAXATION, 6.

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2. TAXATION.—The four classes of property mentioned in the revenue law as subject to taxation, are to be listed, set down, and valued separately in the assessment roll. *Id.*
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- estopped from disputing the correctness of the descriptions of property listed and given in by him under oath to the assessor. *Id.*
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 6. TAXATION—IMPROVEMENTS—PUBLIC LANDS.—Improvements upon lands belonging to the United States are not real estate within the meaning of the revenue act of this territory; and the listing of any such improvements as real estate by an assessor is fatal to the assessment. *People v. Owyhee Lumber Co.*, 420.
 7. ASSESSOR—TAXATION.—Where an assessor fails to discriminate between improvements where the owner thereof is also the owner of the land upon which the same are situated, and those cases where the improvements are upon public lands, this court can not arrive at the conclusion that a want of such discrimination did not mislead him in assessing the property, as to value. *Id.*
 8. TAXATION.—When the aggregate of a column of figures is preceded by a dollar mark, the result must follow that each item of such column is also dollars, although not preceded by such mark; and this, on the well-established maxim in mathematics, that the whole is equal to all its parts. *Id.*

ASSIGNMENT.

1. ASSIGNEE—PARTIES.—The assignee of a chose in action is in all cases the proper party to sue. *Brumback v. Oldham*, 709.
2. ASSIGNEE OF CHOSE IN ACTION—EQUITIES.—The assignee of a chose in action takes it subject to all equities existing at the time of the assignment. *Id.*
3. CONSIDERATION.—The consideration of an assignment need not be alleged or proved. *Id.*
4. ASSIGNEE.—The assignee of an account may bring an action upon it, in his own name, though the assignor retain an interest in it. *Id.*
5. ADMISSIONS OF ASSIGNOR—PURCHASER IN GOOD FAITH.—The admissions or statements of the assignor of chattels, in derogation of his title thereto, made prior to his transfer of the same, can not be introduced in evidence against the title of his assignee who purchased the same in good faith, without knowledge of such statements or admissions. *Deasey v. Thurman*, 775.

ATTACHMENT.

1. DISSOLUTION.—A writ of attachment improperly issued should be dissolved on motion. *Flannagan v. Newberg*, 78.
2. INDEMNIFICATION.—When the sheriff has doubts as to the legality of a levy in the first instance, he may refuse to execute the writ unless indemnified; but if he does attach and returns his writ, he places all question as to its validity before the court. *Roth v. Duvall*, 149.
3. APPLICATION FOR RELEASE.—An application for the release of property held under attachment or execution returned into court, should be made to the court or judge, and not to the attaching officer. *Id.*

BILLS OF EXCHANGE.

DAMAGES.—The language of the statute concerning the damages to be allowed upon protested bills of exchange clearly imports that it was not the

intention of the legislature to restrict such damages to bills drawn by one person or corporation on another person or corporation elsewhere. *Hazard v. Cole*, 276.

BILLS OF REVIEW.

1. A bill of review to reverse a decree erroneous upon its face, by analogy to the time for taking appeals, must be filed within one year from its enrollment, and the same rule applies to a bill brought for the same purpose where the decree itself shows no error, but which error is afterwards discovered when the same period of time has elapsed after the error was discovered. *Hyde v. Lamberson*, 539.
2. DISCRETION.—Leave to file a bill of review which seeks to correct an error not apparent upon the decree which it seeks to reverse, is within the discretion of the court. *Id.*
3. PRACTICE.—After a defendant has demurred to a bill of review, he can not raise an objection to the right of the plaintiff to file it. To avail himself of such objection, he should move the court, on his first appearance, to strike the bill from the files, or to dismiss the suit. *Id.*

CERTIORARI.

1. Three things are necessary to be shown to warrant the granting of a writ of certiorari to the district judge: 1. That the judge exceeded his jurisdiction. 2. That there is no appeal. 3. That there is no other plain, speedy, and adequate remedy. *People v. Lindsay*, 394.
2. DISMISSING WRIT.—A writ of certiorari improperly granted, will be dismissed on motion. *Id.*
3. Certiorari will not lie until the case has been finally disposed of in the inferior court. *Id.*

CHAMPERTY.

PLEADING.—Unless champerty be alleged in the pleadings, it can not be considered. *Brumback v. Oldham*, 709.

CLAIM AND DELIVERY.

1. To support an action of claim and delivery, the property must be a personal chattel at the time of the taking, and not something which has been turned into a chattel by reason of having been separated from the freehold by the defendant. *Hull v. Hull*, 361.
2. COMPLAINT—PLEADING.—If the property claimed be so mixed with other property that a delivery of the specific article can not be made, and the plaintiff fails to ask judgment for its value in case it can not be delivered, the action of claim and delivery can not be maintained. *Id.*
3. PLEADING—NEW MATTER.—When, in an action in claim and delivery for the recovery of personal property, the complaint alleges ownership and a right to the possession, the answer denying these allegations, it is not error in the court to allow the defendant to prove his right to the possession by virtue of a lien to defeat a recovery by plaintiff. The establishment of such right by defendant is not new matter required to be affirmatively pleaded. *Lindsay v. Wyatt*, 738.

COMMON PROPERTY.

HUSBAND AND WIFE.—The husband has the absolute power to dispose of the common property of himself and wife, to the same extent and in the

same manner as he has of his separate property, until a legal separation has been effected by a court of competent jurisdiction, and a division made under the direction of such court. *Ray v. Ray*, 566.

CONSTITUTIONAL LAW.

The legislature may change the manner of the payment of territorial warrants—may issue bonds payable at a different time than the original warrant—but they can not by any provision relieve the territory from the obligation to pay. Legislation of that kind would be to “impair the obligation of contracts,” and would be simply void. *Lamkin v. Sterling*, 92.

CONTINUANCE.

1. DISCRETION.—An application for a continuance is one addressed to the sound and impartial discretion of the court, which should be supported by all the facts and circumstances appertaining to the case. *Herron v. Jury*, 164.
2. DISCRETION.—Postponing a trial rests in the sound discretion of the court; and this court will not review that discretion, unless there appears to have been a very gross abuse in its exercise. *Cox v. N. W. Stage Co.*, 376.
3. DISCRETION.—An application for a continuance is addressed to the sound discretion of the court; and courts of review will refuse to disturb a ruling on such question, unless it appears that such discretion was abused, and the ruling arbitrary. *People v. Walter*, 386.
4. A party is not entitled to a continuance of a cause without showing due diligence and the use of legal means to procure the desired evidence. A bare request to furnish the evidence is, in no sense, a compliance with the requirements of the law. *Alvord v. U. S.*, 585.
5. DUE DILIGENCE.—Where a witness is beyond the reach of the process of the court, a party desiring his testimony must sue out a commission to take his deposition, and a failure to do so shows a want of due diligence and a neglect to use the proper means to obtain the evidence. *Id.*
6. Upon an affidavit showing the absence of a material witness and that proper diligence has been exercised, a party is entitled to a continuance. *Lilienthal v. Anderson*, 673.

CONTRACTS.

1. PARTY PLAINTIFF.—When a contract is made with a party in which another has a beneficial and resulting interest, the party with whom the contract was made has the right to recover though he allege the injury only to be to the stranger to the instrument or contract. *People v. Slocum*, 62.
2. ERASURES—INTERLINEATIONS.—Erasures and interlineations appearing in an obligation at the time of its signing can not in any manner affect the liability of the subscribing parties. *People v. Bugbee*, 88.
3. CONSTITUTIONAL LAW.—The legislature may change the manner of the payment of territorial warrants—may issue bonds payable at a different time than the original warrant—but they can not by any provision relieve the territory from the obligation to pay. Legislation of that kind would be to “impair the obligation of contracts,” and would be simply void. *Lamkin v. Sterling*, 92.
4. REPUDIATION.—The territory can no more repudiate and refuse to pay her debts than a private individual. *Id.*

5. **PARTIES.**—All parties jointly liable on a contract must be made defendants in an action on the contract. *People v. Sloper*, 158.
6. **EXECUTORY—CONSIDERATION—EVIDENCE.**—It is competent for a party to an executory contract to show by parol evidence that the consideration has been paid. *Vincent v. Larson*, 241.
7. **WRITTEN EXTRINSIC EVIDENCE TO EXPLAIN.**—Extrinsic evidence is admissible to explain the recitals and promises of a written contract. *Id.*
8. **AGENT—FEES.**—Any agreement by an agent named in a requisition to take less or more than the fees allowed by law is illegal and void. *Settle v. Sterling*, 259.
9. **WRITTEN INSTRUMENTS—"DUE EXECUTION."**—The due execution of an instrument in writing goes to the manner and the form of its execution, by a person competent to execute it according to the laws and customs of the country where executed. *Cox v. N. W. Stage Co.*, 376.
10. **SEALED INSTRUMENT.**—An instrument under seal, not required by law to be sealed to give it effect, gives it no more solemnity, or makes it no more binding upon the party sought to be charged thereby, than if not under seal. *Id.*
11. **AN AGREEMENT** by A., who has assets in his hands belonging to B., to apply the same for the benefit of C., who is a creditor of B., is not valid, and can not be enforced by C. against A., unless B. has authorized or consented to such application of such assets. *Bozman v. Ainslie*, 644.
12. **TENDER—WAIVER OF.**—A tender of cattle upon a contract, within the time specified, is waived by a subsequent acceptance of them upon the contract. *Emery v. Langley*, 694.
13. **BOND—LIABILITY.**—The affixing of the sum of one thousand dollars between the signature and the seal of the obligor to a bond, the penalty of which is two thousand dollars, will not have the effect to limit his liability to one thousand dollars. *Dangel v. Levy*, 722.

See SURETIES; UNDERTAKINGS.

CONTROLLER.

It is the duty of the controller to carefully examine all claims against the territory presented to him for allowance, and if he is not satisfied that such claim is correct, or if it be not presented within two years from the time it accrued, he may reject it, notwithstanding the certificate of the prison commissioner stating that it is correct. *Crutcher v. Cram*, 372.

CONVEYANCES.

See CONTRACTS, 10.

1. **SHERIFF'S SALE—SHERIFF'S DEED.**—In order to uphold a sheriff's deed, it must appear that a valid judgment was obtained against the party whose property is sought to be conveyed by it, and that the property was sold upon an execution issued upon such judgment. *Leland v. Isenbeck*, 469.
2. **QUITCLAIM DEED—NOTICE.**—A purchaser of real estate who takes a quitclaim deed from his grantor, is presumed to have notice of any defects in his grantor's title; and he purchases at his own risk. *Id.*
3. **INSTRUCTIONS.**—A purchaser of real estate taking a quitclaim deed therefor, not being a *bona fide* purchaser without notice, it was erroneous for the court, by its instructions, to leave that question to be decided by the jury, from the evidence. *Id.*

CORPORATIONS.

1. **CONDITION PRECEDENT.**—If section 1 of an act of the legislature declare certain persons therein named to be a corporation, and in a subsequent section require such corporation, within a certain time thereafter, to give a bond, the giving of such bond is not a condition precedent to the investment of the persons so named with corporate rights and power. *Boise City Canal Co. v. Pinkham*, 790.
2. **ORGANIZATION OF—QUESTIONING REGULARITY OF.**—Individuals can not, in collateral suits, avail themselves of any defects in the organization of a corporation. This may be done only by the power creating them in a direct proceeding instituted for that purpose. *Id.*

COSTS.

1. In no event could this court render judgment against the territory for costs, there being no mode of enforcing it, or process by which it could be made effective. *Beachy v. Lamkin*, 50.
2. **SUITS FOR TAXES.**—In a suit for taxes, although the defendant recovers, the judgment should be general, without costs. *People v. Moore*, 662.
3. **ORDERS AFTER JUDGMENT—APPEAL—PRACTICE.**—An order refusing to re-tax costs, if made after the rendition and entry of final judgment, can only be reviewed upon an appeal from the order. *Emery v. Langley*, 694.
4. **ON APPEAL.**—Where a party unnecessarily multiplies costs excessively, the court will protect the adverse party from payment of such excess. *Sommercamp v. Callow*, 716.

COUNTY COMMISSIONERS.

1. **RESIGNATION—FILLING VACANCY IN OFFICE—COMMISSIONERS.**—Under the statutes, the resignation of a county commissioner must be tendered to the board of which he is a member, and the vacancy must be filled by the commissioners. The governor has no power to fill such vacancies. *People v. Gillespie*, 52.
2. **JURISDICTION.**—A board of county commissioners is a tribunal created by statute, with limited jurisdiction, and only *quasi* judicial powers, and can not act except in strict accordance with the statute. *Gorman v. County Commissioners*, 553.
3. **RECORD—PRESUMPTIONS.**—The order of a board of county commissioners, requiring the officers-elect to give bonds in particular sums, is of no force except as to the officers-elect at the time of making such order. The board of county commissioners is required, by law, to keep a record of its proceedings, and no presumption arises as to the regularity of any of their proceedings, not appearing of record, even though parties may have acted upon the supposed order of such board. *Id.*
4. **JURISDICTION.**—A board of county commissioners has no power or authority to pass upon the malfeasance or misfeasance of an officer; those questions belong to a higher tribunal, having jurisdiction to punish the officer, if found guilty. *Id.*
5. **APPEALS FROM ORDERS OF—JUDGMENT ON.**—On an appeal to a district court from an order of a board of county commissioners, rejecting a claim against a county, a money judgment can not be rendered, either

against the board or the county. The order must be affirmed, or reversed and directions given to the board to allow it, or annulled, or modified and sent back with directions to pass upon it as modified. *Gorman v. County Commissioners*, 627.

6. PARTY—COUNTY.—A county can not be made a party in an appeal from an order of the board of commissioners. It can only be proceeded against by an action under the provisions of the statute which authorizes suits against a county. *Id.*

CRIMINAL LAW AND PRACTICE.

1. WAIVER OF RIGHTS IN CRIMINAL CASES.—In a criminal case, a party does not waive his rights by not insisting upon them, and if the court had no jurisdiction by law to try the case, it is not cured by the party failing to claim his right to be dismissed. *People v. Du Rell*, 44.
2. JURISDICTION OF DISTRICT COURTS, HOW ACQUIRED IN CRIMINAL CASES. The district courts can acquire jurisdiction of cases for the punishment of violations of license laws in two ways only: First, by the regular intervention of a grand jury; and, second, by appeal from justices' courts. *Id.*
3. INSTRUCTIONS—REFUSAL.—Upon the trial of an indictment for murder, it is the duty of the court to give an instruction to the jury, if requested, that they can find the defendant guilty of a less grade of offense than murder in the first degree, if warranted by the evidence; and a refusal to give such instruction is error. *McBRIDE, C. J., dissenting. People v. Dunn*, 74.
4. INDICTMENT—MOTION.—For the purposes of a motion to set aside an indictment, the facts stated in it are to be taken as true. *People v. Williams*, 85.
5. TIME.—If there was no law defining the crime and imposing a penalty at the time the offense is alleged in the indictment to have been committed, time is material, and the indictment should be set aside. *Id.*
6. MOTION.—A motion to set aside an indictment, based upon objections going to the merits of the case, can be made at any time, either before or after judgment. *Id.*
7. INDICTMENT.—P. was indicted under the latter clause of section 88 of the crimes and punishment act, in which indictment the crime was charged in the following language: "Knowingly and willfully did have in his possession, and secretly did keep (enumerating the instruments), then and there being instruments for the purpose of counterfeiting uncoined gold," etc.: *Held*, that this indictment was not sufficient, in not charging that these instruments were had by the defendant for the purpose of counterfeiting, etc. *People v. Page*, 102.
8. EVIDENCE—PRESUMPTIONS.—The knowingly and secretly keeping instruments adapted and intended for the unlawful business of counterfeiting, is made proof of the guilty aim to use them for the evil purpose for which they were evidently designed. It is a presumption that the prisoner is called upon to rebut. *Id.*
9. COUNTERFEITING GOLD DUST.—Simply passing counterfeit gold dust is not an offense under our penal code. The uttering must be accompanied with the knowledge that it is a false imitation, and it must have been the in-

- tention of the utterer to defraud the person receiving it. *People v. Sloper*, 158.
10. VERDICT—JUDGMENT.—On an indictment for an assault with intent to commit murder, when any less grade of offense is found by the jury, the verdict must show the character of the offense so found, and the judgment must not exceed that warranted by the verdict. *People v. Cozad*, 167.
 11. COUNTERFEIT GOLD DUST—UTTERING OR ATTEMPTING TO UTTER.—The crime of uttering or attempting to utter counterfeit gold dust consists in the possession of a counterfeit or spurious article, knowing it to be such, and passing it, or attempting to pass it, with intent to defraud. *People v. Page*, 189.
 12. INSTRUCTIONS—INTENT TO DEFRAUD. —It was correct to instruct the jury that if they believed beyond a reasonable doubt that the defendant had, and passed, or attempted to pass, a debased or counterfeit article of gold dust, knowing its spurious character, the conclusion necessarily followed that he intended to defraud. *Id.*
 13. DEBASING GOLD DUST.—No definite amount or proportion of relative difference in the actual value of genuine gold dust and that which is counterfeit is required. It is sufficient that it be debased, and that the party uttering it is cognizant of the fact, and passes it for a genuine article. *Id.*
 14. PRESUMPTION.—The general rule in criminal cases is that every person is supposed to contemplate the result, and know the nature of his acts, so that when the acts which constitute the crime are established, the guilt is presumed. Guilty purpose is presumed from the commission of an unlawful or forbidden act. *Id.*
 15. LARCENY.—In order to constitute the crime of larceny it is necessary that the property taken should have an owner, and that it be taken with felonious intent. *People v. Frank*, 200.
 16. PLEADING—DEMURRER.—The objection that an indictment charges two offenses must be taken by demurrer. *People v. Nash*, 206.
 17. IDEM.—An objection to an indictment, that it sets forth no sufficient charge of a criminal offense, should not be allowed to prevail in a doubtful case, but only when the insufficiency is so palpable as clearly to satisfy the mind of the judge that a verdict thereon would not authorize a judgment. *Id.*
 18. DEGREE OF PROOF.—It is not necessary for the prosecution to exclude every possible defense in order to secure a conviction. *Id.*
 19. EVIDENCE—REPUTATION OF DECEASED.—The rule is well settled that the reputation of the deceased can not be given in evidence, unless the circumstances of the case raise a doubt whether the defendant acted in self-defense. *People v. Stock*, 218.
 20. JURY—DISCHARGING JURY.—There is no particular length of time prescribed by law for keeping a jury together. The time is entirely within the discretion of the court. *Id.*
 21. MOTION TO SET ASIDE INDICTMENT.—After pleading to an indictment, and the setting of the case for trial, it is too late to move to quash or set aside the indictment. *People v. Butler*, 231.
 22. IDEM.—The statute having prescribed the grounds upon which a motion to set an indictment aside may be made, all other grounds are excluded. *Id.*

23. **IDEM.**—An indictment is sufficient in substance if it describes the offense in the language of the statute by which it is created or defined. *Id.*
See MURDER, 1, 2.
24. **FLIGHT—EVIDENCE.**—Evidence of flight by a person accused of crime is admissible for the purpose of showing who did the act, not for the purpose of determining the degree of the offense. *People v. Ah Choy*, 317.
25. **DISTRICT COURTS.**—In cases of prosecution for misdemeanors, where the fine or penalty does not exceed one hundred dollars, the district courts and justices' courts have concurrent jurisdiction. *People v. Maxon*, 330.
26. **APPEAL—RECORD—NOTICE OF APPEAL—PRACTICE.**—An appeal is taken by filing and serving notice thereof, as required by statute, and the record on appeal must show that such notice was so filed and served, or the case will be dismissed out of this court for want of jurisdiction. *People v. Lynch*, 358.
27. **INSANITY—BURDEN OF PROOF.**—If the defendant relies upon insanity to procure an acquittal, he assumes the burden of proof as to that matter. He makes insanity an affirmative issue on his part; hence, to establish a defense on the ground of insanity, the defendant must, by a preponderance of evidence, show to the jury, that at the time of the commission of the act, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing wrong, in respect to the act with which he is charged. *People v. Walter*, 386.
28. **HOMICIDE—MURDER.**—Every homicide, unexplained, is murder; but it is the province of the jury to determine, from the evidence and circumstances before them, whether the crime be murder in the first or second degree. *Id.*
29. **IF THE DEFENDANT ADMITTED** the killing, in this case, he admitted that he was guilty of murder, if he was not insane; and it should have been submitted to the jury, under proper instructions, to say, from the evidence, whether the crime was murder in the first or second degree. *Id.*
30. **PREJUDICE—CRIMINAL LAW.**—No matter of form, not tending to the prejudice of the defendant in a criminal case, will be regarded. *Pickett v. U. S.*, 523.
31. **FORGERY.**—If the original instrument alleged to have been forged or counterfeited, is void upon its face, an indictment for forgery will not lie for counterfeiting such instrument. *People v. Heed*, 531.
32. **RECORD—EXCEPTIONS.**—Any matter not otherwise forming a part of the record, must be made so, by a bill of exceptions. *People v. Waters*, 560.
33. **IDEM.**—All the formalities required by the statute to be observed in a criminal case, are not required to be made a part of the record. *Id.*
34. **RECORD—MATTERS NOT A PART OF.**—The statute does not require that the fact of the arraignment, or that the jury was admonished at each adjournment of the court, or that the officer in charge of the jury was sworn, should be made a part of the record of the action. *Id.*
35. **THE FORMALITIES REQUIRED BY OUR STATUTE** to be observed, in the trial of felonies, are the same in one class or grade as in any other class or grade. *Id.*
36. **INDICTMENT—SURPLUSAGE.**—If an indictment conclude with "*contra formam statuti*," and no statute exist concerning the offense charged, yet

if the facts alleged constitute a common law offense, and the same be charged with certainty, the conclusion of the indictment will be treated as surplusage, and the indictment be held good. *People v. Buchanan*, 681.

37. INSTRUCTIONS.—If the defendant asks the court to give certain instructions prepared by him, and the same contain the law of the case, but so mixed with erroneous matter that they are calculated to mislead the jury, it is not error for the court to refuse the whole. *Id.*
38. BAWDY-HOUSE—RESIDING IN.—The residing in a bawdy-house is not an offense against any statute of the territory, nor is it an offense at common law. *People v. Ah Ho*, 691.
39. ARRAIGNMENT—RECORD.—It is not necessary for the record on appeal to show an arraignment. The fact of an arraignment is not necessarily a part of the record. *People v. Ah Hop*, 698.
40. INDICTMENT—ACCESSARIES.—An indictment charging five persons with murder in one count, and four of the same persons with being accessaries before the fact in another count, does not charge two offenses. *Id.*
41. INDICTMENT — PRINCIPALS — ACCESSARIES — SURPLUSAGE.—The statute requires all persons concerned in the commission of an offense, whether as principals or accessaries before the fact, to be indicted as principals, and a second count in such indictment charging a portion of the same persons with being accessaries before the fact, is surplusage, which does not vitiate the indictment. *Id.*

See VERDICT, 6.

42. PRESUMPTIONS.—The presumptions are in favor of the regularity of the proceedings in the district court, in criminal as well as in civil cases. *Id.*
43. TECHNICAL DEFECTS.—This court will give judgment without regard to technical defects, which do not affect substantial rights. *Id.*
44. WAIVER.—If a defendant does not insist upon the mere formalities of the law in the court below, he will be deemed to have waived them. It is too late to take advantage of them for the first time in this court, on appeal. *Id.*
45. APPEAL—REVIEW—QUESTIONS OF LAW.—Upon appeal in criminal cases, the review in this court is confined to questions of law arising upon exceptions taken on the trial and errors appearing in the record. The evidence constitutes no part of the record, and it must be disregarded, except for the purpose of determining the materiality of the exceptions. *Id.*
46. KEEPING GAMING-HOUSE—GAMING.—The common law in relation to the offense of keeping gaming-houses, is superseded by the statute of the sixth session, entitled "An act relating to all games of chance." *People v. Goldman*, 714.
47. RECORD—BILL OF EXCEPTIONS—STATEMENT—ASSIGNMENT OF ERRORS.—When a transcript on appeal in a criminal case contains no bill of exceptions or statement, and no assignment of errors, there is nothing for the consideration of the appellate court, but the indictment, the minutes, and the instructions. *People v. O'Conner*, 759.
48. INDICTMENT.—An indictment must contain so many of the substantial words of the statute as shall enable the court to see on what statute it is framed, and such other words as are necessary to a complete description

of the offense; or words which are their equivalents or more than their equivalents in meaning. *United States v. Mayo*, 763.

49. JEOPARDY.—Jeopardy is putting in danger. The word danger is the equivalent of jeopardy. The words of an indictment, “in bodily fear and danger of his life, then and there feloniously did put,” are equivalent to the words “put his life in jeopardy.” *Id.*
50. DANGEROUS WEAPONS, USE OF.—For a person to arm himself with dangerous weapons and carry them to the place of the robbery, with intent to kill, is the “use of dangerous weapons.” *Id.*

See INDICTMENT.

DAMAGES.

1. ON APPEAL.—Affidavits can not be read in support of a motion for damages for failure to prosecute an appeal. *Cady v. Scaniker*, 168.
2. There is no question of the right of this court to allow damages in cases when appeals have been taken merely for delay, and no transcript ever called for. *Id.*
3. BILLS OF EXCHANGE.—The language of the statute concerning the damages to be allowed upon protested bills of exchange clearly imports that it was not the intention of the legislature to restrict such damages to bills drawn by one person or corporation on another person or corporation elsewhere. *Hazard v. Cole*, 276.
4. The word “damages” as used in the United States statutes, concerning *supersedeas* bonds on writ of error and appeal to the supreme court of the United States, includes the loss which the defendant in error or appellee may sustain by reason of not having the judgment appealed from paid or executed. *Ray v. Ray*, 705.

DEFAULT.

When judgment is rendered upon the default of a defendant, the recovery must follow the prayer of the complaint. *Lowe v. Turner*, 107.

See JUDGMENT, 5.

DEFENSE.

1. EQUITABLE PLEADING.—Under the provisions of sec. 49 of the code, an equitable defense may be pleaded to a legal cause of action. *Wa Ching v. Constantine*, 266.
2. COLLATERAL ATTACKS—ADMINISTRATOR.—Where an administrator of a deceased person's estate brings an action upon a promissory note due the estate, the authority of such administrator can not be attacked by the defendant, on the ground that his appointment was irregularly made. Having no interest in the estate, it is a matter of no importance to the defendants, if they would be protected from a second payment of the same sum. *Glendenning v. McNutt*, 592.
3. PRACTICE.—Under the code of procedure a defendant is not only permitted, but is required to set up all matters of defense, by answer in the original action, whether such matters are legal or equitable in their character. *Utah & N. R. Co. v. Crawford*, 770.
4. DEFINITION OF.—A defense, in the sense of the code, is a right possessed by the defendant, which, either partially or wholly, defeats the plaintiff's claim. *Id.*

DEFINITIONS.

1. **EVIDENCE—REBUTTING EVIDENCE.**—Rebutting evidence is that which is given to explain, repel, counteract, or disprove testimony or facts given in evidence by the adverse party. It is a general rule that anything may be given as rebutting evidence, which is a direct reply to that introduced by the other side. *People v. Page*, 189.
2. **PROCESS.**—The word process, as used in the statute, is equivalent in meaning to the sheriff's official authority. *People v. Nash*, 206.
3. **SPECIMENS DEFINED.**—"Specimens of gold and silver ores," in common and ordinary acceptation, means pieces and samples of such ores severed from the ledges. *People v. Freeman*, 322.
4. **WRITTEN INSTRUMENTS—"DUE EXECUTION."**—The due execution of an instrument in writing goes to the manner and the form of its execution, by a person competent to execute it according to the laws and customs of the country where executed. *Cox v. N. W. Stage Co.*, 376.
5. **"GENUINENESS" OF AN INSTRUMENT.**—The genuineness of an instrument in writing goes to the question of its having been the act of the party, just as represented; or, in other words, that the signature is not spurious, and that nothing has been added to or taken from it, which would lay the party signing or changing the instrument liable for forgery. *Id.*
6. **IMPROVEMENTS.**—By the term "improvements" on public lands, as used in the revenue law, is meant the buildings and improvements belonging to the possessory claimant, such as miners' buildings, quartzmills, sawmills, out-buildings, fences, etc. *People v. Owyhee M. Co.*, 409.
7. **JUDGMENT.**—Judgment is a general term for adjudications of a court, and, in its broadest sense, includes decrees. *Forsythe v. Richardson*, 459.
8. **ESTOPPEL.**—In order to create an equitable estoppel, there must be an admission, act, or declaration intended to influence the conduct of another; and actually leading him into a line of conduct which would be prejudicial to his interests, unless the party estopped be cut off from the power of retraction. *Leland v. Isenbeck*, 469.
9. **IDEM—JEOPARDY.**—Jeopardy is putting in danger. The word danger is the equivalent of jeopardy. The words of an indictment, "in bodily fear and danger of his life, then and there feloniously did put," are equivalent to the words "put his life in jeopardy." *United States v. Mayo*, 763.
10. **"DEFENSE."**—A defense, in the sense of the code, is a right possessed by the defendant, which, either partially or wholly, defeats the plaintiff's claim. *Utah & N. R. Co. v. Crawford*, 770.
11. **"ADVERSE PARTY" DEFINED.**—The term "adverse party" in section 201 of our civil practice act has the same signification as to matters deemed excepted to as the term "aggrieved party," in section 436 of the same act. *Fox v. West*, 782.

DEMURRER.

1. **CRIMINAL LAW—PLEADING.**—The objection that an indictment charges two offenses must be taken by demurrer. *People v. Nash*, 206.

See INDICTMENT, 6.

COMPLAINT.—The objection that a complaint does not state facts sufficient to constitute a cause of action, is never waived. *Greathouse v. Heed*, 482

3. PROBATE COURT.—A demurrer is a proper pleading in the probate court. *Leggett v. Meyers*, 548.
See PLEADING, 11, 15.

DISCRETION.

1. CONTINUANCE.—An application for a continuance is one addressed to the sound and impartial discretion of the court, which should be supported by all the facts and circumstances appertaining to the case. *Herron v. Jury*, 164.
2. SPECIFIC PERFORMANCE.—The specific performance of a contract is not a matter of right, strictly speaking, but a matter in the sound and reasonable discretion of the court. *Vincent v. Larson*, 241.
3. CONTINUANCE.—Postponing a trial rests in the sound discretion of the court; and this court will not review that discretion, unless there appears to have been a very gross abuse in its exercise. *Cox v. N. W. Stage Co.*, 376.
4. IDEM.—An application for a continuance is addressed to the sound discretion of the court; and courts of review will refuse to disturb a ruling on such question, unless it appears that such discretion was abused, and the ruling arbitrary. *People v. Walter*, 386.
5. BILLS OF REVIEW.—Leave to file a bill of review which seeks to correct an error not apparent upon the decree which it seeks to reverse, is within the discretion of the court. *Hyde v. Lamberson*, 539.
6. GRANTING A CHANGE OF VENUE is a matter in the sound discretion of the court, and will not be reviewed except in cases of abuse. *Hyde v. Harkness*, 601.

DISTRICT ATTORNEY.

1. INDICTMENT.—The criminal practice act does not require the district attorney to sign indictments; nor does it prescribe a failure to sign as a ground for setting the indictment aside. *People v. Butler*, 231.
2. UNITED STATES DISTRICT ATTORNEY.—The United States district attorney has no right, power, or authority, except that conferred upon him by law prescribing his duties. The designation of "attorney for said territory," as used in our organic act, is synonymous with that of "the attorney of the United States," in the organic act of Washington Territory. *People v. Heed*, 402.
3. IDEM.—Congress having failed to provide that this officer should prosecute in cases arising under territorial laws, he can act as prosecuting attorney only when the courts are exercising jurisdiction as circuit and district courts of the United States. *Id.*

DISTRICT COURT.

See CRIMINAL LAW AND PRACTICE, 2.

1. JURISDICTION—PROBATE COURTS—DISTRICT COURTS.—The act of congress, approved December 13, 1870, giving jurisdiction to the probate courts in certain cases, does not confer exclusive jurisdiction upon those courts in such cases. It does not take away the jurisdiction of the district court therein, but the power of the district courts and the probate courts is by said act made concurrent in certain cases. *Greathouse v. Heed*, 494.

2. **TERRITORIAL COURTS.**—The district courts of the territory are not United States courts, but territorial courts with the jurisdiction of the circuit and district courts of the United States, conferred upon them by law. *Pickett v. U. S.*, 523.
See JURISDICTION, 15.
3. **JURY MUST FIND FACTS—COURT MUST GIVE THE LAW.**—A verdict must be supported by the facts found by the jury, and the law must be given to them by the court. *Ralston v. Plowman*, 595.
4. **APPEALS FROM ORDERS OF COUNTY COMMISSIONERS—JUDGMENT ON.**—On an appeal to a district court from an order of a board of county commissioners, rejecting a claim against a county, a money judgment can not be rendered, either against the board or the county. The order must be affirmed, or reversed and directions given to the board to allow it, or annulled, or modified and sent back with directions to pass upon it as modified. *Gorman v. County Commissioners*, 627.
5. **QUO WARRANTO—JURISDICTION.**—An action for the usurpation of an office, in the nature of *quo warranto*, brought in the name of the people, on the territorial side of the district court, for the removal of a county officer, is properly brought. *People v. Curtis*, 753.
6. **TERRITORIAL DISTRICT COURTS—PRACTICE IN.**—The territorial district courts are not district courts of the United States. The legislature may prescribe the practice in the district courts of the territory, in cases arising under the constitution and laws of the United States, as well as in those arising under the laws of the territory. In this territory, however, the legislature has not done so; and the courts are at liberty to make orders and adopt regulations concerning the practice in United States cases, for themselves. *U. S. v. Mays*, 763.
7. **TERRITORIAL COURTS—JURISDICTION.**—The courts of the territory are in some respects *sui generis*. They have a broader and more extensive jurisdiction than state courts, or the district and circuit courts of the United States. *Id.*
8. **JURY FROM THIS VICINAGE.**—A jury summoned under the laws of the territory from the county in which the district court is being held, for the transaction of business under the territorial laws, may be adopted by the court for the transaction of business and the disposition of cases arising under the laws of the United States. Such a jury is, in every respect, from the vicinage, since it is drawn from the district within which the crime was committed, although the commission of the crime took place in another county of the district. *Id.*
9. **IDEM.**—Congress having, by law, given the district courts of the territory jurisdiction of offenses against the laws of the United States, and having given the justices of the supreme court power to fix the times and places of holding district courts; by so fixing them they have also fixed the place of trial of offenses against the laws of the United States. Congress, therefore, having, by means of the power thus delegated, fixed the place of trial, has disposed of all questions of jurisdiction of the court, as well as all objections to the jury as not being drawn from the vicinage. *Id.*

DOWER.

Our statute has abolished dower, but has substituted more liberal provisions in its stead. *Morgan v. Ireland*, 786.

EJECTMENT.

See ABANDONMENT, 1; LANDS, 1-3, 5, 6.

EQUITY.

1. **MULTIPLICITY OF SUITS.**—The doctrine of the interposition of a court of equity to prevent a multiplicity of suits can not be maintained where there is simply a multitude of individuals, plaintiffs, whose several interests are not dependent upon one another. *Wilkerson v. Walters*, 564.
2. **REMEDY AT LAW.**—Equity will not relieve where the parties have had a plain and speedy remedy at law, which, by their own negligence, they have not availed themselves of. *Id.*
3. **ACTIONS.**—An action will not lie in a court of equity, to enforce a decree against a person not a party to such decree; nor will such action lie against one who is a party to such decree when he remains within the jurisdiction, and is amenable to the process of the court which rendered the decree. *Ray v. Ray*, 566.
4. **COURTS OF EQUITY.**—There is no power in a court of equity to confirm or enforce a void judgment by a subsequent proceeding instituted for the purpose. *Id.*
5. **ASSIGNEE OF CHOSE IN ACTION—EQUITIES.**—The assignee of a chose in action takes it subject to all equities existing at the time of the assignment. *Brumback v. Oldham*, 709.
6. **INJUNCTION ENJOINING ACTION AT LAW.**—A defendant may not, under the code, bring his separate suit in equity to enjoin the original action at law when his complaint consists of matter defensive to such original action. *Utah & N. R. Co. v. Crawford*, 770.

ERASURES AND INTERLINEATIONS.

See CONTRACTS, 2.

1. **UNDERTAKING—ALTERATION OF—FRAUD.**—When, in an undertaking for two thousand dollars, the figures one thousand dollars entered between the signature and seal of one of the sureties, were erased after it was signed by him; this was no fraud upon any other surety who signed the undertaking after the erasure. *Dangel v. Levy*, 722.
2. **UNDERTAKING FOR INJUNCTION.**—Where an undertaking for an injunction was executed and delivered after an erasure had been made, it can not be presumed that the obligee was a party to such alteration or erasure. *Id.*

ERROR, ASSIGNMENT OF.

1. **EXCEPTIONS.**—Appellant may except to any erroneous ruling of the court below, but he must, in his assignment of errors in this court, specify and point out those upon which he relies, otherwise all such will be treated as waived. *People v. Page*, 102.

See PRACTICE, 12.

2. **PRESUMPTION.**—An appellate court will not presume error in the court below, and thus throw the *onus* on the respondent of establishing its correctness. "All intendments must be in favor of sustaining the judgments of courts of original jurisdiction, and to disturb such judgment it is not sufficient that error may have intervened, but it must be affirmatively shown by the record." *Goodman v. Minear M. & M. Co.*, 131.

3. PRACTICE.—The supreme court will not scrutinize a voluminous transcript to ascertain whether the inferior court may possibly have committed some error to the prejudice of the complaining party, unless it should first have been assigned. *Feirbaugh v. Masterson*, 135.
4. PRACTICE—EXCEPTIONS—WAIVER.—All exceptions taken in the court below will be treated as waived, unless the matters so excepted to are assigned as error in this court. *Purdy v. Steel*, 216.

ESTOPPEL.

1. JUDGMENT.—A judgment on demurrer to a bill in chancery, that the bill is bad in substance, or does not state facts sufficient to constitute a cause of action, can not be pleaded in bar to a good bill for the same cause of action. Such judgment is, in no sense, a judgment on the merits. *Lockett v. Lindsay*, 324.
2. INSTRUCTIONS—PLEADING.—A party to an action can not avail himself of the benefits of an estoppel, unless he plead it. It is error for the court to submit such question to the jury by instruction, unless it be pleaded. *Leland v. Isenbeck*, 469.
3. In order to create an equitable estoppel, there must be an admission, act, or declaration intended to influence the conduct of another; and actually leading him into a line of conduct which would be prejudicial to his interests, unless the party estopped be cut off from the power of retraction. *Id.*

EVIDENCE.

1. ADMISSIONS CONTAINED IN PLEADINGS.—Written admissions of the defendants in their original answer are still admissions tending to establish the facts thus admitted, and are as much evidence to be considered as any other admissions, notwithstanding they were stricken out on defendants' own motion. *Bloomington v. Du Rell*, 33.
2. RECEIPT NOT CONCLUSIVE. *Id.*
3. CUMULATIVE.—When newly discovered evidence relates to a substantial point or particular fact which was inquired into on the trial, it is cumulative. *Flannagan v. Newberg*, 78.

See NEW TRIAL, 1.

4. BOND.—Bond was executed and delivered into the custody of the clerk of the court in which the defendant was to appear; the parties executing such bond as sureties took and subscribed a justification on such bond which was administered by the judge of the court, and was by him approved at the time: *Held*, from the facts the court very properly found that the signatures were genuine, and that the execution of such bond was sufficiently proven. *People v. Bugbee*, 88.

See PRESUMPTION, 2.

5. REBUTTING.—Rebutting evidence is that which is given to explain, repel, counteract, or disprove testimony or facts given in evidence by the adverse party. It is a general rule that anything may be given as rebutting evidence, which is a direct reply to that introduced by the other side. *People v. Page*, 189.
6. LARCENY.—In an indictment for larceny it is necessary that the ownership of the property taken should be alleged, and such averment must be proved substantially as laid. *People v. Frank*, 200.

7. **DEGREE OF PROOF.**—It is not necessary for the prosecution to exclude every possible defense in order to secure a conviction. *People v. Nash*, 206.
8. **IMPEACHMENT—WITNESS.**—The rule for the introduction of evidence to contradict a witness is as follows: If the fact to which the contradiction applies is material to the issue, he may be contradicted; but when it is immaterial, and not within the issue, contradictory evidence can not be introduced. *People v. Stock*, 218.
9. **REPUTATION OF DECEASED.**—The rule is well settled that the reputation of the deceased can not be given in evidence, unless the circumstances of the case raise a doubt whether the defendant acted in self-defense. *Id.*
10. **EXECUTORY CONTRACT—CONSIDERATION.**—It is competent for a party to an executory contract to show by parol evidence that the consideration has been paid. *Vincent v. Larson*, 241.
11. **WRITTEN CONTRACT, EXTRINSIC EVIDENCE TO EXPLAIN.**—Extrinsic evidence is admissible to explain the recitals and promises of a written contract. *Id.*
12. **FLIGHT.**—Evidence of flight by a person accused of crime is admissible for the purpose of showing who did the act, not for the purpose of determining the degree of the offense. *People v. Ah Choy*, 317.
13. **ERROR.**—It is not error for the court below to admit improper evidence, such as a sheriff's deed, without first showing a valid judgment, unless objection be made to its introduction. *Leland v. Isenbeck*, 469.
14. **RES GESTÆ.**—In order to entitle declarations to be received in evidence as part of the *res gestæ*, they must be a part of an act, and such as may serve to explain or qualify it, and must have been made while such act was being performed. *Kramer v. Settle*, 485.
15. **RECORD OF MINING CLAIMS.**—The statute which provides that copies of papers duly filed in the recorder's office, certified by the recorder, shall be received with like effect, in courts, as the original instruments, etc., gives the same effect to such copies as courts would give to the originals when produced, and their execution proved. *Id.*
16. **ERRORS WHICH DO NOT PREJUDICE.**—Where the district court refused to admit evidence which, if admitted, would have been against the party seeking to introduce it, such party can not avail himself of such refusal as error, even though such evidence should have been admitted. *Glendenning v. McNutt*, 592.
17. **PAROL EVIDENCE** can not be given of a mining custom, when there are written rules or regulations of the mining district in force on the same subject. *Ralston v. Plowman*, 595.
18. Evidence which is capable of affording an inference of a fact, or which constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it, should be admitted. It is error to reject such evidence. *Lillienthal v. Anderson*, 673.
19. **PLEADINGS AND PROOF ON SUPERSEDEAS BONDS.**—In an action upon a *supersedeas* bond in a case wherein the proceedings have been staid by the bond, it is not necessary to allege or prove that the action in which the bond was given, was an appealable one. *Ray v. Ray*, 705.
20. **ADMISSIONS OF ASSIGNOR—PURCHASER IN GOOD FAITH.**—The admissions or statements of the assignor of chattels, in derogation of his title

thereto, made prior to his transfer of the same, can not be introduced in evidence against the title of his assignee who purchased the same in good faith, without knowledge of such statements or admissions. *Deasey v. Thurman*, 775.

EXCEPTIONS.

1. **ASSIGNMENT OF ERRORS.**—Appellant may except to any erroneous ruling of the court below, but he must, in his assignment of errors in this court, specify and point out those upon which he relies, otherwise all such will be treated as waived. *People v. Page*, 102.
2. **PRACTICE.**—It is undoubtedly the general rule that when a party seeks to reverse a judgment rendered in the inferior court, he must except to the ruling of the court and assign the error in this court on appeal. *Lamkin v. Sterling*, 120.
3. The exceptions to the rule that exceptions must be first taken in the court below are where a complaint is so radically defective that it discloses no cause of action and will not support a judgment; and where a judgment has been taken by default and the appellant could not except by reason of his non-appearance, and who was bound to see that the proceedings were regular and legal. *Id.*
4. When there is sufficient in a complaint to support a judgment, notwithstanding it may be defectively stated and open to demurrer in the first instance, still if the judgment thus rendered be not excepted to, the appellant has lost his rights, and can not reverse the judgment, however patent the error. *Id.*
5. There is no rule of practice governing legal proceedings more clearly defined, nor better settled, than that any objections of whatever character, whether with reference to the regularity of the proceedings on the trial of the cause, or to error of law committed by the judge in relation to a motion, or of any ruling whatever on a question of law arising during the proceedings, must be taken at once, at the time when the question arises. *Id.*
6. The code has denominated the hearing and disposing of questions or issues of law, trials. When, therefore, a cause is called to dispose of any issue, whether of law or fact, it is, in contemplation of section 191, called for trial, so far at least as to require all rulings of the court which it is desired to have reviewed in an appellate court incorporated into a bill of exceptions. *Id.*
7. No exceptions having been taken to the ruling of the court below, we can only look into the judgment roll so far as to see if it will support a judgment. *Smith v. Sterling*, 128.
8. **DISMISSAL OF APPEAL.**—Where no exceptions are taken in the court below to an order of that court denying a motion to open a default and set aside a judgment, an appeal from such order will be dismissed. *Goodman v. Minear M. & M. Co.*, 131.
9. **COMPLAINT—APPELLATE COURT.**—Where an action is tried in the district court upon its merits, and a finding of facts is made and judgment rendered thereon, no exceptions being taken, the only question that will be considered by the supreme court is, whether the complaint states facts sufficient to warrant the judgment. *Diehl v. Hull*, 352.
10. **INSTRUCTIONS.**—The proper mode of bringing before the appellate court,

for review, the instructions given by the court on its own motion, is, by embodying them in a bill of exceptions. *People v. Walter*, 386.

11. APPELLATE COURT—RECORD—STATEMENT—BILL OF EXCEPTIONS.—This court can not consider alleged errors not apparent in the record, nor brought into it by a statement or bill of exceptions, properly settled and signed by the judge of the district court, or agreed to by the parties. *People v. Hunt*, 433.
12. If a party desires to have a decision of the district court reviewed by this court, he must except thereto when the ruling or decision is made; and he must also preserve and bring up such exceptions by bill of exceptions or statement. *Id.*
13. STATEMENT.—If it does not appear from the statement made on a motion for a new trial, that any exceptions were taken at the trial to any ruling of the court, the statement is useless on an appeal from the judgment. *Forsythe v. Richardson*, 459.
14. APPEAL—STATEMENT—BILL OF EXCEPTIONS—PRACTICE.—Upon an appeal from a judgment without a statement or bill of exceptions, nothing can be considered except the judgment roll; and if no error appear therein, the judgment will be affirmed. *McCoy v. Oldham*, 465.
15. If a party take no exception to an order of court confirming the report of a referee, he is not in a condition to urge objections to such order in this court. *Taylor v. Peterson*, 513.
16. Exceptions must be taken to an order overruling a new trial, and preserved in the record, if a party wish to avail himself of the error in the appellate court. *Id.*
17. FINDINGS—STATEMENT—REVIEW.—This court will not look into a statement with a view to determine therefrom whether the evidence will support the findings or judgment, unless the party has placed himself in a position to object to the order of the court overruling a motion for a new trial by proper exceptions, any further than it will where no appeal has been taken from such order. *Id.*
18. PRACTICE.—The exceptions which, by section 201 of the civil practice act, the adverse party is deemed to have taken, have the same force and effect in the conduct of the action as other exceptions taken during the trial, and can not be considered on appeal without being incorporated into a bill of exceptions, and thus made a part of the record. *Fox v. West*, 782.

EXEMPTION.

EXEMPT PROPERTY—JUDICIAL DISCRETION.—The question as to whether property is exempt from execution involves the exercise of judicial discretion, and its decision is not confided to the action of the attaching officer. *Roth v. Duvall*, 149.

See WAIVER, 4.

FEES.

1. GOVERNOR—OF AGENT.—The governor has a right to the appointment of an agent; but can not fix any terms as to his fees. *Settle v. Sterling*, 259.
2. AGREEMENT—AGENT.—Any agreement by an agent named in a requisition to take less or more than the fees allowed by law is illegal and void. *Id.*
3. OF ASSESSOR AND TAX COLLECTOR—ROAD TAX.—The assessor and tax col-

lector of Boise county is entitled to retain fifteen per cent. of all road tax collected by him, in full compensation for his services in collecting the same. *Gorman v. County Com.*, 647.

4. **IDEM—SCHOOL TAX.**—The tax collectors are not entitled to any compensation whatever for collecting school tax or revenue raised for the maintenance and support of public schools under the school law of this territory. *Id.*
5. **OFFICE—OFFICER.**—A. was duly elected to the office of assessor and tax collector, and presented his bond for approval to the county commissioners, who refused to accept it, and thereupon appointed B. to fill the office. B. duly qualified, collected the taxes, and received compensation therefor: *Held*, that A., on being restored to office, could not recover from the county the fees to which he would have been entitled if in office. *Gorman v. County Com.*, 655.
6. **IDEM.**—The right to compensation is an incident to the services rendered, and not to the office. *Id.*
7. **OFFICER DE FACTO.**—The incumbent of an office, though only an officer *de facto* under color of right, is alone entitled to compensation for the services performed by him. *Id.*

FINDINGS.

1. **WHEN A COURT** fails to find upon a question, that question can not be considered for the first time in this court, unless the finding is necessary to enable the court to render judgment. *Gamble v. Dunwell*, 268.
2. **IDEM.**—*Held*, that all questions put in issue and not found upon by the district court would have been found against the appellants, or were deemed immaterial. *Id.*
3. **WHEN NO TESTIMONY** is reported in a statement, from which this court can determine as to the propriety or impropriety of the findings of the court below, the presumption is that the testimony was, in every respect, sufficient to support the findings. *Hazard v. Cole*, 276.
4. **IT IS NOT A GROUND** for a new trial that the findings were not filed until after the adjournment of the term of court. *Id.*
5. **PRESUMPTIONS.**—In the absence of findings of fact from the record in a cause tried by the court without a jury, the presumption is that they were waived. If not, that fact should appear affirmatively. *Squier v. Lowenberg*, 785.

FRAUD.

1. **JUDGMENTS—IMPEACHMENT.**—A judgment can only be impeached in equity for fraud in its concoction, and in no case for mere irregularity. *Hazard v. Cole*, 276.
2. **WEIGHT OF EVIDENCE.**—If there is some evidence tending to show fraud, the question, whether or not there actually was fraud, is to be submitted to the jury. *Cox v. N. W. Stage Co.*, 376.
3. **PURCHASER OF REAL ESTATE—REPRESENTATIONS BY VENDOR.**—A purchaser of real estate is bound to exercise ordinary prudence and discretion, and if the means of knowledge are within his power, and he neglects to make the proper inquiry, he loses his remedy against the vendor, for any representations the latter makes. *Brown v. Bledsoe*, 746.
4. **FRAUDULENT REPRESENTATIONS BY VENDOR.**—False representations by a vendor to the purchaser, as to the situation, condition, and value of real

estate, are not actionable, even though knowingly made, unless the purchaser has been fraudulently induced to forbear inquiry as to their truth. *Id.*

FRAUDS—STATUTE OF.

1. The statute of frauds must be pleaded in the court below, or it can not be considered upon appeal. *Kraft v. Greathouse*, 254.
2. CHANGE OF POSSESSION.—The statute of frauds does not require personal property to be removed from the place where situated when sold. It does not in any sense refer to the place, but to the actual and continued change of possession. *Hazard v. Cole*, 276.

GAMING-HOUSE.

KEEPING.—The common law in relation to the offense of keeping gaming-houses, is superseded by the statute of the sixth session, entitled "An act relating to all games of chance." *People v. Goldman*, 714.

GOVERNOR.

FEEs OF AGENT.—The governor has a right to the appointment of an agent; but can not fix any terms as to his fees. *Settle v. Sterling*, 259.

HUSBAND AND WIFE.

COMMON PROPERTY.—The husband has the absolute power to dispose of the common property of himself and wife, to the same extent, and in the same manner as he has of his separate property, until a legal separation has been effected by a court of competent jurisdiction, and a division made under the direction of such court. *Ray v. Ray*, 566.

INDIANS.

1. TRADE AND INTERCOURSE.—It was by virtue of the act of congress of June 5, 1850, and not the act of June 30, 1834, that the law regulating trade and intercourse with the Indian tribes east of the Rocky mountains, or such provisions of the same as were applicable, were extended over the Indian tribes of Oregon. *Pickett v. U. S.*, 523.
2. The act of congress organizing the territory of Oregon, reserved to the government of the United States the right to make any regulations respecting the person and property of the Indians, which it would have been competent for the government to make had the act never been passed. *Id.*
3. This territory having been originally a portion of Oregon, and congress, in organizing it, having reserved the right to make such regulations respecting the persons and property of the Indians, as in the organization of Oregon territory, the act of 1850, and the provisions of the act of 1834, so far as applicable, remain in force in this territory. *Id.*
4. INDIAN TRIBES.—The provisions of the twenty-fifth section of the act of congress of 1834, regulating trade and intercourse with the Indians, is as applicable to the Indian tribes in this territory as any portion of the act; hence, the territory of Idaho is Indian country, but only so far as the rights of the persons and property of the Indian tribes are concerned, and therefore, to that extent, within the sole and exclusive jurisdiction of the United States. *Id.*

5. JURISDICTION—DISTRICT COURTS—INDIAN RESERVATION.—A district court has jurisdiction over Indian reservations in any organized county of this territory, and its process may run and be served there, if there be no treaty to the contrary with the Indians thereof. *Hyde v. Harkness*, 536.
6. NEZ PERCE INDIANS—RESERVATION—TREATY.—The treaty between the United States and the Nez Perce tribe of Indians, concluded June 9, 1863, proclaimed April 20, 1867, reserved for the sole use and occupation of said tribe, the territory, or tract of country therein described. *Langford v. Monteith*, 612.
7. IDEM—SETTLERS UPON THAT RESERVATION ARE TRESPASSERS.—Settlers upon the reservation granted by treaty to the Nez Perce Indians and all others, except such as are permitted by the treaty, who go thereon to occupy or possess any portion of the land embraced therein, are trespassers. No agreement for the use and occupancy of any portion of said land between the plaintiff and another white person, can be enforced. *Id.*

INDICTMENT.

1. MOTION.—For the purposes of a motion to set aside an indictment, the facts stated in it are to be taken as true. *People v. Williams*, 85.
2. IDEM.—A motion to set aside an indictment, based upon objections going to the merits of the case, can be made at any time, either before or after judgment. *Id.*
3. P. was indicted under the latter clause of section 88 of the crimes and punishment act, in which indictment the crime was charged in the following language: "Knowingly and willfully did have in his possession and secretly did keep (enumerating the instruments), then and there being instruments for the purpose of counterfeiting uncoined gold," etc.: *Held*, that this indictment was not sufficient, in not charging that these instruments were had by the defendant for the purpose of counterfeiting, etc. *People v. Page*, 102.
4. LARCENY.—In an indictment for larceny it is necessary that the ownership of the property taken should be alleged, and such averment must be proved substantially as laid. *People v. Frank*, 200.
5. PROOF—VARIANCE.—If in an indictment for larceny the property is alleged to be that of W., but on the trial be proven to be that of W. & Co., consisting of W. and another person, the variance is fatal. *Id.*

See DEMURRER, 1.

6. An objection to an indictment, that it sets forth no sufficient charge of a criminal offense, should not be allowed to prevail in a doubtful case, but only when the insufficiency is so palpable as clearly to satisfy the mind of the judge that a verdict thereon would not authorize a judgment. *People v. Nash*, 206.
7. MOTION TO SET ASIDE—PRACTICE.—After pleading to an indictment, and the setting of the case for trial, it is too late to move to quash or set aside the indictment. *People v. Butler*, 231.
8. The criminal practice act does not require the district attorney to sign indictments; nor does it prescribe a failure to sign as a ground for setting the indictment aside. *Id.*
9. MOTION TO SET ASIDE.—The statute having prescribed the grounds upon

which a motion to set an indictment aside may be made, all other grounds are excluded. *Id.*

10. ROBBERY.—In an indictment for robbery, the words “felonious” and “rob” carry with them the intent, and are sufficient. *Id.*
11. An indictment is sufficient in substance if it describes the offense in the language of the statute by which it is created or defined. *Id.*
12. MURDER.—A failure to set forth the title of the action in an indictment is not fatal. The statute requiring it is directory. Sufficiency of an indictment for murder considered. *People v. Walters*, 271.
13. CRIMINAL LAW.—An indictment for murder is sufficient if it charges the killing to have been done with malice aforethought; this is defined by lexicographers as meaning premeditated, and premeditated and deliberate are synonymous terms. *People v. Ah Choy*, 317.
14. LAW—DESCRIPTION OF PROPERTY.—The common and ordinary acceptance of property is to govern in its description; the description must be such as will enable a jury to say whether the chattel proved to have been stolen is the same as that charged in the indictment. *People v. Freeman*, 322.
15. An indictment charging the property stolen as “a quantity of specimens of gold and silver ores of one hundred and fifty pounds in weight” is sufficient. *Id.*
16. ACCESSARIES.—An indictment charging five persons with murder in one count, and four of the same persons with being accessaries before the fact in another count, does not charge two offenses. *People v. Ah Hop*, 698.
17. PRINCIPALS—ACCESSARIES—SURPLUSAGE.—The statute requires all persons concerned in the commission of an offense, whether as principals or accessaries before the fact, to be indicted as principals, and a second count in such indictment charging a portion of the same persons with being accessaries before the fact, is surplusage, which does not vitiate the indictment. *Id.*
18. An indictment must contain so many of the substantial words of the statute as shall enable the court to see on what statute it is framed, and such other words as are necessary to a complete description of the offense; or words which are their equivalents or more than their equivalents in meaning. *U. S. v. Mays*, 763.

INDORSER.

1. PROMISSORY NOTE—NOTICE.—The undertaking of an indorser is conditional; that is, his promise is that he will pay provided payment shall be demanded of the maker and due notice of his neglect or refusal shall be given. *Ankney v. Henry*, 229.
2. CONTRACT WITH INDORSERS.—The person receiving a note by indorsement contracts with the indorser whom he expects to hold, that he will present it to the maker at maturity, for payment, and if not paid that he will give notice of non-payment without delay. *Id.*

INJUNCTION.

1. DISSOLVING.—A party denying the allegations of a bill in equity, and desiring to procure the dissolution of an injunction on the ground of having denied the equities of such bill, must controvert directly every material

- allegation of such bill; he must not undertake to set up new facts, must not confess and avoid. It must simply be a plain, direct, unequivocal denial. *Oro Fino M. Co. v. Cullen*, 113.
2. WHEN THE WHOLE EQUITY OF THE COMPLAINT IS DENIED by the answer, the defendant is entitled to a dissolution of the injunction *pendente lite* until the plaintiff's title is established by proper evidence on the hearing of the cause. But to have this effect the denial of such equities must be full and specific, and must cover the whole ground. *Id.*
 3. IF FACTS ARE ADMITTED which qualify a general denial; if the denials be evasively made; or if, on examination of the circumstances, the court deem that the facts warrant the continuance of the injunction notwithstanding a formal denial may have been made, the rule will not be applied. *Id.*

See TAXES AND TAXATION, 8.

4. UNDERTAKING.—An undertaking for an injunction is sufficient without the signature of the plaintiff in the action. *Pence v. Durbin*, 550.
5. AN INJUNCTION WILL NOT LIE TO PROHIBIT a person from bringing an action to test his right to property, though such right has been adjudged against him in an action to which he was not a party. *Ray v. Ray*, 566.
6. ENJOINING ACTION AT LAW.—A defendant may not, under the code, bring his separate suit in equity to enjoin the original action at law when his complaint consists of matter defensive to such original action. *Utah & N. R. Co. v. Crawford*, 770.

INSANITY.

BURDEN OF PROOF.—If the defendant relies upon insanity to procure an acquittal, he assumes the burden of proof as to that matter. He makes insanity an affirmative issue on his part; hence, to establish a defense on the ground of insanity, the defendant must, by a preponderance of evidence, show to the jury, that at the time of the commission of the act, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing wrong, in respect to the act with which he is charged. *People v. Walter*, 386.

INSOLVENCY.

PETITION.—A petition in insolvency should show the date of the debts, as those which existed prior to the passage of the insolvent debtors' act, are not affected by it. *Goodell v. Creditors*, 215.

INSTRUCTIONS.

1. It is not error to refuse an instruction which is foreign to the pleadings and evidence, although correct in principle. *Henry v. Jones*, 48.
2. REFUSAL.—Upon the trial of an indictment for murder, it is the duty of the court to give an instruction to the jury, if requested, that they can find the defendant guilty of a less grade of offense than murder in the first degree, if warranted by the evidence; and a refusal to give such instruction is error. *McBRIDE, C. J., dissenting. People v. Dunn*, 74.
3. The following instruction was given by the court: "No quartz claim can exceed two hundred feet in length along the lead or lode, and if the jury believe from the evidence the claim of A. was purposely located to include

- a greater number of feet than two hundred, then the location is an attempted fraud upon the provisions of the law and the rights of others, and the location is null and void as against subsequent locators, and the jury must find for defendants:" *Held*, that this was erroneous. To claim more than the law allows is no fraud on others, for they have the same means of ascertaining the attempted fraud that the other has of committing it. *Atkins v. Hendree*, 95.
4. **INTENT TO DEFRAUD.**—It was correct to instruct the jury that if they believed beyond a reasonable doubt that the defendant had, and passed, or attempted to pass, a debased or counterfeit article of gold dust, knowing its spurious character, the conclusion necessarily followed that he intended to defraud. *People v. Page*, 189.
 5. **BILL OF EXCEPTIONS.**—The proper mode of bringing before the appellate court, for review, the instructions given by the court on its own motion, is, by embodying them in a bill of exceptions. *People v. Walter*, 386.
 6. A purchaser of real estate taking a quitclaim deed therefor, not being a *bona fide* purchaser without notice, it was erroneous for the court, by its instructions, to leave that question to be decided by the jury, from the evidence. *Leland v. Isenbeck*, 469.
 7. It is error for a court, in its instructions to a jury, to assume that material disputed facts have been proven. It is for the jury to find the facts from the evidence. *Id.*
 8. **REPRESENTATION—WORK DONE ON MINING CLAIM.**—The court below was requested to instruct the jury that "work done outside of a mining claim, and with direct reference to the claim, may be considered as work done on the claim." To this the court added the following qualification: "The evidence of such work having been done should be received with great caution, and it should appear clearly that such work was intended for the improvement of such claim and no other," and gave the instruction so qualified: *Held*, that this was not erroneous. *Kramer v. Settle*, 485.
 9. It is erroneous to instruct a jury to find a verdict according to mining customs, "if such customs are not contrary to law." It is likewise erroneous to instruct a jury, if they believe the version of the case by one or the other party to be correct, they will find in his favor. *Ralston v. Plowman*, 595.
 10. **NEW TRIAL—EVIDENCE, INSUFFICIENCY OF—PRESUMPTIONS.**—When written instructions are not given to the jury, this court will presume that the law of the case was correctly given, unless the contrary appears; but when there is a great preponderance in the weight of evidence against the verdict, this court will presume that the jury misconceived either the evidence or the law, and will order a new trial. *Monarch G. & S. M. Co. v. McLaughlin*, 617.
 11. **ADMISSIONS OF PLEADINGS.**—It is error for the court to instruct the jury that it is necessary for the plaintiff to prove facts alleged in the complaint and not denied by the answer. The failure to deny a material allegation contained in a complaint, is an admission of it; and the admission is conclusive evidence of the fact admitted. *Lillienthal v. Anderson*, 673.
 12. If the defendant ask the court to give certain instructions prepared by him, and the same contain the law of the case, but so mixed with erroneous matter that they are calculated to mislead the jury, it is not error for the court to refuse the whole. *People v. Buchanan*, 681.

13. **EXCEPTIONS—RECORD.**—An instruction, not excepted to, in a civil case, is not properly a part of the record, and can not be reviewed upon an appeal. *Emery v. Langley*, 694.
14. The relevancy of instructions is to be determined by the evidence in the case. *Dangel v. Lery*, 722.
15. An instruction to the jury "that if they believe from the evidence that the defendants feloniously took possession of the United States mail, or any part thereof, by force or intimidation of or from a carrier of the mail, then the offense of robbery is complete," is simply a definition of the term robbery, as applied to the case. It is not erroneous. *U. S. v. Maya*, 763.
16. When the court instructs a jury upon what state of facts they must find a verdict for or against the party, the instructions should include all the facts in the controversy, material to the rights of the parties upon the claim of the plaintiff and the defense of the defendant. *Deasey v. Thurman*, 775.

INTEREST.

In the absence of an agreement to pay interest, and of any accounting between the parties, interest does not run, as a general rule. *Taylor v. Peterson*, 513.

INTERVENTION.

QUO WARRANTO.—The right of intervention given by statute exists only in actions which are purely civil in their character. The statutory proceeding in the nature of a *quo warranto* is quasi criminal in character, and in such action the right to intervene does not exist. *People v. Green*, 235.

JOINDER OF CAUSES OF ACTION.

Those causes of action growing directly out of the breach of an undertaking can be the subject of but one action. *Pence v. Durbin*, 550.

See PLEADINGS, 1.

JUDGE AT CHAMBERS.

1. **DISTRICT COURT—JURISDICTION—QUO WARRANTO.**—The district court has jurisdiction on *quo warranto* to determine the rights of several parties who claim to be entitled to the office of sheriff; and the judge of that court may properly decide, in such case, whether it is necessary to allege in the complaint that there has been an actual usurpation of the office; and if there be error in the ruling, such error may be corrected on appeal. *People v. Lindsay*, 394.
2. **APPEAL.**—An appeal lies from the judgment of a district judge at chambers. *Id.*
3. **JURISDICTION.**—A judge of a district court does not exceed his jurisdiction by issuing an order or writ to enforce a judgment rendered by him at chambers. *Id.*

JUDICIAL AND EXECUTION SALES.

1. **VOIDABLE JUDGMENT.**—A purchaser at a sheriff's sale, under execution, upon a judgment which is voidable only, acquires a good title. *Hazard v. Cole*, 276.

2. **PURCHASER AT SHERIFF'S SALE.**—A purchaser under execution does not depend for his title upon the fact or the regularity of the sheriff making such sale. *Id.*
3. **CERTIFICATE—FILING—NOTICE.**—The filing of a certificate of sale of real estate by the officer making the sale, and in the manner prescribed by statute, imparts to all the world constructive notice of the estate acquired by the purchaser under it, as well as the fact of sale and its legal consequences. *Id.*
4. **PROBATE COURT—SALE OF REAL ESTATE BY.**—An order for the sale of real estate, under the provisions of the probate act, is a judgment in a new, separate, and independent proceeding, depending for its validity upon the sufficiency of the facts alleged in the petition for the order. *Ethell v. Nichols*, 741.

JUDICIAL NOTICE.

1. **COURTS—OFFICERS.**—Courts will take official cognizance of their own officers. *People v. Butler*, 231.
2. This court is bound to take notice of the long-established and well-known usages of the country. *People v. Owyhee Lumber Co.*, 420.
3. **ORDINANCES.**—Courts will not take judicial knowledge of city ordinances; they must be proved by the record, or by certified copies thereof. *People v. Buchanan*, 681.

JUDGMENT.

1. **SEVERAL.**—When a plaintiff establishes a cause of action against one or more of the defendants in an action for a tort or on a contract, and it appears in the latter case that the defendants were not joint contractors, or jointly liable, he is entitled to a judgment against those against whom he establishes his cause of action. *Bloomingtondale v. Du Rell*, 33.

See TENANTS IN COMMON, 1.

2. **JOINT DEBTORS.**—A judgment can not be rendered against property generally and against one of the owners thereof in a right of action clearly against all jointly. *Lowe v. Turner*, 107.
3. **PRACTICE.**—It is error to enter judgment against one of the defendants, after having sustained a demurrer to the complaint upon the ground that such pleading “does not state facts sufficient to constitute a cause of action,” without first amending the same. *Id.*
4. In cases of trial, the plaintiff should recover such judgment as he shows himself entitled to under the pleadings and proof. *Id.*
5. When judgment is rendered upon the default of a defendant, the recovery must follow the prayer of the complaint. *Id.*

See CRIMINAL LAW AND PRACTICE, 10.

6. **VERDICT—PRACTICE—ADMISSIONS.**—The omission of the jury to find by their verdict, the amount due, when that question is not in controversy, does not deprive the prevailing party of his right to a judgment for the sum admitted to be due by the pleadings. *Betts v. Butler*, 185.
7. **APPEAL—MODIFICATION OF.**—In cases on appeal where there is no issue of fact, this court will order the judgment of the court below corrected if erroneous in some particular matter only; or reverse it and order the proper judgment to be entered by the court below. *Id.*
8. **IMPEACHMENT—FRAUD.**—A judgment can only be impeached in equity for

fraud in its concoction, and in no case for mere irregularity. *Hazard v. Cole*, 276.

9. **GOLD COIN.**—A judgment for gold coin is not in any event void because it is so rendered. It may be irregular, but is then subject to modification only, either in the same court on motion, or on appeal by this court. *Id.*
10. **SHERIFF'S SALE—VOIDABLE.**—A purchaser at a sheriff's sale, under execution, upon a judgment which is voidable only, acquires a good title. *Id.*
11. **ESTOPPEL.**—A judgment on demurrer to a bill in chancery, that the bill is bad in substance, or does not state facts sufficient to constitute a cause of action, can not be pleaded in bar to a good bill for the same cause of action. Such judgment is, in no sense, a judgment on the merits. *Lockett v. Lindsay*, 324.
12. **SUMMONS—EXECUTION.**—A summons to A., B., C., or D. is a nullity, inasmuch as it is in the alternative, and not to all, nor to either of them. A judgment and execution, upon such summons, are likewise void, for want of jurisdiction of the defendants. *Alexander v. Leland*, 425.
13. A judgment to be valid must be certain and conclusive as to the subject-matter and parties to the action, and must be capable of execution. *Id.*
14. **DEFINITION.**—Judgment is a general term for adjudications of a court, and, in its broadest sense, includes decrees. *Forsythe v. Richardson*, 459.
15. A judgment which is void *ab initio*, may be attacked, collaterally, without appealing therefrom to this court. *Leland v. Isenbeck*, 469.
16. **ON THE PLEADINGS.**—If the allegations of a complaint are not denied by the defendant, the plaintiff is entitled to a judgment on the pleadings, without any proof on his part. *Alvord v. U. S.*, 585.
17. **POWER OF COURT OVER, DURING TERM.**—Courts have full power during the term to alter, revise, revoke, annul, or amend their judgments and all other proceedings, and the rights of parties can not be considered as fully settled, until the judgments pass beyond the control of the court. *Moore v. Taylor*, 630.
18. **CONSTRUCTION OF.**—In passing upon the meaning and effect of their judgments, courts sometimes look behind them to see upon what they are founded, and the intention of courts is to be deduced from every part of the judgment and the proceedings leading thereto; and when the intention is accurately ascertained, it will always prevail over mere words. Hence, although the word "reversed" is used in a judgment of this court, yet if it can be ascertained from its whole scope that it was only the intention to modify, and not vacate the judgment of the court below, it will be considered as an affirmance of such judgment, as modified. *Id.*
19. **FOR GOLD COIN.**—A gold-coin judgment is not erroneous when the question is in issue whether an oral contract required payment in gold coin or currency. *Emery v. Langley*, 694.
20. **TECHNICAL DEFECTS.**—This court will give judgment without regard to technical defects, which do not affect substantial rights. *People v. Ah Hop*, 698.
21. **FINAL.**—A judgment entered by the clerk of the district court in vacation is a final judgment. *Hardiman v. S. Chariot M. Co.*, 704.
22. **DEFAULT.**—No distinction exists, as to the right of appeal, between judgments entered by default by the clerk, and those rendered after trial upon issues joined. An appeal lies from a judgment in either case within one year after its rendition or entry. *Id.*

23. **ERRORS WHICH DO NOT PREJUDICE.**—For errors and defects in the pleadings and proceedings, which do not affect the substantial rights of the party complaining, a judgment will not be reversed. *Dangel v. Levy*, 722.

JURISDICTION.

1. **WAIVER OF RIGHTS IN CRIMINAL CASES.**—In a criminal case, a party does not waive his rights by not insisting upon them, and if the court had no jurisdiction by law to try the case, it is not cured by the party failing to claim his right to be dismissed. *People v. Du Rell*, 44.
2. **PROBATE COURTS.**—The probate courts of this territory have not jurisdiction of cases for the punishment of offenders under the license laws. *Id.*
3. **OF DISTRICT COURTS, HOW ACQUIRED IN CRIMINAL CASES.**—The district courts can acquire jurisdiction of cases for the punishment of violations of license laws in two ways only: First, by the regular intervention of a grand jury; and, second, by appeal from justices' courts. *Id.*
4. **PROBATE COURTS.**—The act of the legislature conferring appellate jurisdiction upon the probate courts in civil cases, is in conflict with the organic act. *Moore v. Koubly*, 55.
5. **EQUITABLE—LEGAL.**—Legal and equitable relief may be sought in the same action, and by the same complaint, but the grounds therefor must be distinctly and separately stated. *Wa Ching v. Constantine*, 266.
6. **EQUITY.**—The fact that the property is not within the jurisdiction of the court constitutes no bar in a court of equity, for a court of equity acts upon the person. *Gamble v. Dunwell*, 268.
7. **AFTER A CRIMINAL CASE** has been certified back to the district court, the supreme court has no longer any jurisdiction over it, but all necessary orders must be made by the court to which it has been certified. *People v. Walters*, 274.
8. **DISTRICT COURTS.**—In cases of prosecution for misdemeanors, where the fine or penalty does not exceed one hundred dollars, the district courts and justices' courts have concurrent jurisdiction. *People v. Maxon*, 330.
See JUDGE AT CHAMBERS, 1.
9. **JUDGE AT CHAMBERS.**—A judge of a district court does not exceed his jurisdiction by issuing an order or writ to enforce a judgment rendered by him at chambers. *People v. Lindsay*, 394.
10. **Before a court, clothed with jurisdiction of a person or subject-matter,** can be ousted of it by the creation of another forum, having the same power, the grant of jurisdiction to the latter must contain words of exclusion. *Greathouse v. Heed*, 494.
11. **PROBATE COURTS—DISTRICT COURTS.**—The act of congress, approved December 13, 1870, giving jurisdiction to the probate courts in certain cases, does not confer exclusive jurisdiction upon those courts in such cases. It does not take away the jurisdiction of the district court therein, but the power of the district courts and the probate courts is by said act made concurrent in certain cases. *Id.*
12. **LEGISLATIVE POWER.**—When the act of congress of December 13, 1870, had invested the probate courts with enlarged jurisdiction, it was competent for the territorial legislature to limit and define its character, and to extend it, except as to the amount involved. It was, therefore, competent for the legislature to provide that the jurisdiction of the district

- and probate courts, in certain cases, should be concurrent, as is provided by its act of January 11, 1871. *Id.*
13. TERRITORIAL COURTS.—The district courts of the territory are not United States courts, but territorial courts with the jurisdiction of the circuit and district courts of the United States, conferred upon them by law. *Pickett v. U. S.*, 523.
 14. SUBJECT-MATTER.—It must be determined from the subject-matter of the action, and not from the title of the court, whether the action is one arising under the laws of the United States or of the territory. *Id.*
 15. DISTRICT COURTS—INDIAN RESERVATION.—A district court has jurisdiction over Indian reservations in any organized county of this territory, and its process may run and be served there, if there be no treaty to the contrary with the Indians thereof. *Hyde v. Harkness*, 536.
 16. COUNTY COMMISSIONERS.—A board of county commissioners is a tribunal created by statute, with limited jurisdiction, and only *quasi* judicial powers, and can not act except in strict accordance with the statute. *Gorman v. County Commissioners*, 553.
 17. EQUITY—ACTIONS.—An action will not lie in a court of equity, to enforce a decree against a person not a party to such decree; nor will such action lie against one who is a party to such decree when he remains within the jurisdiction, and is amenable to the process of the court which rendered the decree. *Ray v. Ray*, 566.
 18. COURTS OF EQUITY.—There is no power in a court of equity to confirm or enforce a void judgment by a subsequent proceeding instituted for the purpose. *Id.*
 19. APPEAL—JURISDICTIONAL FACTS.—The filing of the notice of appeal and the service of a copy thereof are jurisdictional facts, and go to the right of appeal. *Slocum v. Slocum*, 589.
 20. PROBATE COURTS.—When the existence of jurisdiction of inferior courts of which the probate court is one, is proved or conceded, the maxim *omnia rite acta* applies to them as well as to courts of general jurisdiction, and every intendment must be in support of the proceedings. *Glendenning v. McNutt*, 592.
 21. PROBATE COURT.—Jurisdiction of the subject-matter is one thing, and the exercise of it another. An irregular or erroneous exercise of its jurisdiction, by a probate court, will not render its proceedings void, but voidable only. *Id.*
 22. JUDICIAL ACTS—MINISTERIAL ACTS—NON-JUDICIAL DAY.—The act of appointing an administrator of an estate by a probate court is a judicial act, while that of issuing letters of administration is merely ministerial; therefore, the statute only forbidding the transaction of judicial business on Christmas day, letters issued on that day are not void. *Id.*
 23. NOTICE OF APPEAL—SERVICE.—In order to give this court jurisdiction of a case, on an appeal, it is necessary that the transcript should show that the notice of appeal has been served on the adverse party. Unless the record shows such service the appeal will be dismissed. *Anderson v. Knott*, 626.
 24. JUDGMENTS—POWER OF COURT OVER DURING TERM.—Courts have full power during the term to alter, revise, revoke, annul, or amend their judgments and all other proceedings, and the rights of parties can

not be considered as fully settled, until the judgments pass beyond the control of the court. *Moore v. Taylor*, 630.

25. PROBATE COURTS.—Probate courts are courts of special and limited statutory jurisdiction. *Ethell v. Nichols*, 741.
26. IDEM.—It is necessary to the jurisdiction of the probate court making the order of sale of real estate, that there should be a petition therefor, sufficient, in substance, to show legal grounds for the order; and it is necessary to prove that there was such a petition when the jurisdiction of the probate court to make the order of sale is controverted. *Id.*
27. TERRITORIAL COURTS.—The courts of the territory are in some respects *sui generis*. They have a broader and more extensive jurisdiction than state courts, or the district and circuit courts of the United States. *United States v. Mays*, 763.

JURY.

1. It is error for the court to draw a jury from a list prepared by the judge and sheriff until the regular panel is exhausted; and that fact must appear from the record. *People v. Dunn*, 74.
2. DISCHARGING.—There is no particular length of time prescribed by law for keeping a jury together. The time is entirely within the discretion of the court. *People v. Stock*, 218.
3. FRAUD—WEIGHT OF EVIDENCE.—If there is some evidence tending to show fraud, the question, whether or not there actually was fraud, is to be submitted to the jury. *Cox v. N. W. Stage Co.*, 376.
4. PRESUMPTION.—A jury is presumed to have found its verdict upon the facts without having been influenced by passion or prejudice, and where a verdict is for a less sum than the full amount demanded in the prayer of the complaint, this presumption is strengthened. That a jury has been influenced by passion or prejudice must be made to appear affirmatively. *Id.*
5. INSTRUCTIONS.—It is error for a court, in its instructions to a jury, to assume that material disputed facts have been proven. It is for the jury to find the facts from the evidence. *Leland v. Isenbeck*, 469.
6. MUST FIND FACTS—COURT MUST GIVE THE LAW.—A verdict must be supported by the facts found by the jury, and the law must be given to them by the court. *Ralston v. Plowman*, 595.
7. IRREGULARITY.—No irregularity in drawing, summoning, returning, or impaneling trial jurors is sufficient to set aside a verdict, unless injury results, nor unless the objection is made before verdict. *People v. Ah Hop*, 698.
8. FROM THE VICINAGE.—A jury summoned under the laws of the territory from the county in which the district court is being held, for the transaction of business under the territorial laws, may be adopted by the court for the transaction of business and the disposition of cases arising under the laws of the United States. Such a jury is, in every respect, from the vicinage, since it is drawn from the district within which the crime was committed, although the commission of the crime took place in another county of the district. *U. S. v. Mays*, 763.

JUSTICES OF THE PEACE.

CRIMINAL LAW JURISDICTION—JUSTICES' COURTS—LEGISLATIVE POWER.—
The legislature has no power, under the organic act, to authorize a justice

of the peace to try a criminal case in which the fine or penalty exceeds, or may exceed, one hundred dollars. *People v. Maxon*, 330.

See JURISDICTION, 8.

LANDS.

1. PRIOR POSSESSION.—To entitle a party to hold by right of prior possession, there must be an actual *bona fide* occupation, a *possessio pedis*, a subjection to the will and control. *Feirbaugh v. Masterson*, 135.
2. PUBLIC LANDS—ACTUAL POSSESSION.—In relation to public lands which are not mineral lands, the title, as between citizens of the territory, where neither connects himself with the government, is considered as vested in the first possessor, and to proceed from him. This possession must be actual, and not constructive. *Id.*
3. PRIOR POSSESSION—ACTUAL POSSESSION.—Where reliance is placed upon the prior possession of the plaintiff, or of parties through whom he claims, such possession must be shown to have been actual in him or them. By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. *Id.*
4. NOTICE.—The lines were pointed out to the defendant by the plaintiffs with reasonable accuracy, and we see no good reason why actual notice is not equally as good so far as bringing home to the defendant a knowledge of the plaintiffs' rights as that afforded by stakes or like monuments. *Id.*
5. Having gone into the actual possession of a portion of the premises, they were entitled to a reasonable length of time in which to inclose them. What this length of time should be must, for the most part, depend upon the particular circumstances and locality of each claim. *Id.*
6. POSSESSION OF PART.—If a party were to locate and claim for agricultural purposes a tract of land, and were to reside upon, inclose, and cultivate a portion of the same, having artificial monuments sufficient to indicate generally the boundaries of the entire claim, this would most certainly be a substantial compliance with the rule, and such possession of a part would draw after it the possession of the whole. *Id.*
7. IMPROVEMENTS—PUBLIC LANDS—TAXATION.—Improvements upon public lands, as also the possessory right thereto, are taxable. *Quivy v. Lawrence*, 313.
8. ASSESSMENT—TAXATION—PUBLIC LANDS.—The assessment of land is a prerequisite which can not be dispensed with. It is the basis upon which all subsequent proceedings rest. For the purpose of defeating a tax deed, evidence may be given that the land was not assessed, or that it is public land. *Id.*
9. TAX SALE.—If the improvements on land be assessed and taxed, a sale of the land for such tax is void. *Id.*
10. TRESPASS—PUBLIC LANDS.—It is no defense to an action or prosecution for trespass committed upon public land, that such land is the property of the United States. *People v. Maxon*, 330.
11. PUBLIC LANDS—TAXATION.—No law of the territory can authorize the sale of the lands of the United States for taxes; such a sale would be void. *People v. Owyhee M. Co.*, 409.

12. **TAXATION—IMPROVEMENTS—PUBLIC LANDS.**—Improvements upon lands belonging to the United States are not real estate within the meaning of the revenue act of this territory; and the listing of any such improvements as real estate by an assessor is fatal to the assessment. *People v. Owyhee Lumber Co.*, 420.
13. **PUBLIC LANDS—POSSESSION.**—If the public lands of the United States are claimed by virtue of possession alone, the claimant is bound to take such precautionary steps as will advise all the world of his rights. *Forsythe v. Richardson*, 459.
14. **PURCHASER OF REAL ESTATE—REPRESENTATIONS BY VENDOR.**—A purchaser of real estate is bound to exercise ordinary prudence and discretion, and if the means of knowledge are within his power, and he neglects to make the proper inquiry, he loses his remedy against the vendor, for any representations the latter makes. *Brown v. Bledsoe*, 746.
15. **FRAUDULENT REPRESENTATIONS BY VENDOR.**—False representations by a vendor to the purchaser, as to the situation, condition, and value of real estate, are not actionable, even though knowingly made, unless the purchaser has been fraudulently induced to forbear inquiry as to their truth. *Id.*

LARCENY.

1. **IN ORDER TO CONSTITUTE** the crime of larceny it is necessary that the property taken should have an owner, and that it be taken with felonious intent. *People v. Frank*, 200.

See INDICTMENT, 4, 5.

2. **DESCRIPTION OF PROPERTY—INDICTMENT.**—The common and ordinary acceptance of property is to govern in its description; the description must be such as will enable a jury to say whether the chattel proved to have been stolen is the same as that charged in the indictment. *People v. Freeman*, 322.
3. **INDICTMENT.**—An indictment charging the property stolen as “a quantity of specimens of gold and silver ores of one hundred and fifty pounds in weight,” is sufficient. *Id.*

LAW OF THE CASE.

- A DECISION OF THE SUPREME COURT** in a given case, even although it be erroneous, becomes the law of the case upon the points involved, and can not be reviewed, altered, or changed upon a subsequent hearing in this court. *Lindsay v. People*, 438.

LEGISLATURE.

See ORGANIC ACT.

1. **PRACTICE—APPEALS—WRITS OF ERROR—BILLS OF EXCEPTION.**—The legislative assembly has authority to regulate the mode of taking and allowing writs of error, bills of exception and appeals; and such regulations, when made, apply to all cases, whether arising under the laws of the United States, or of the territory. *United States v. Gilson*, 364.
2. **LEGISLATIVE POWER.**—When the act of congress of December 13, 1870, had invested the probate courts with enlarged jurisdiction, it was competent for the territorial legislature to limit and define its character, and to extend it, except as to the amount involved. It was, therefore, com-

- petent for the legislature to provide that the jurisdiction of the district and probate courts, in certain cases, should be concurrent, as is provided by its act of January 11, 1871. *Greathouse v. Heed*, 494.
3. TAXATION.—Congress has sufficiently authorized the legislature of this territory to pass a law requiring the taxation of national bank shares in the hands of individuals or corporations. *People v. Moore*, 504.
 4. LEGISLATIVE POWER—PARDON.—An act of the legislative assembly of the territory remitting the penalty imposed in a criminal action, duly approved by the governor, is equivalent to a pardon. *People v. Stewart*, 546.
 5. ASSESSMENT—TAXATION.—It is competent for the legislature to provide for the assessment and collection of taxes by either of two counties in a disputed or doubtful district, when it is left optional with the taxpayer to pay the taxes in the county where the land is actually situated. *People v. Wilkerson*, 619.
 6. IDEM—DEFENSES.—It is also within the power of the legislature to define by law the grounds upon which a party sued for his taxes may set up a defense. *Id.*
 7. CONSTRUCTION OF STATUTES.—Acts of the legislature are not to be construed retrospectively, so as to take away vested rights, although they may alter or modify the remedy, nor can a healing act affect existing judgments. *People v. Moore*, 662.

LIMITATIONS—STATUTE OF.

1. The statute of limitations can not be raised in the supreme court for the first time, as upon a general demurrer to the complaint. It must be taken advantage of in the court below, by answer or demurrer. *Kraft v. Greathouse*, 254.
2. The statute of limitations begins to run from the time when the action might properly be commenced. *Pridgeon v. Greathouse*, 359.
3. A law extending the time within which actions may be commenced, can only affect causes of action existing at the time of its passage. It can not revive causes of action already barred; and as to existing causes of action, the time must be computed from the period when the action might have been commenced, and not from the passage of the law extending the time. *Id.*
4. CLAIMS AGAINST THE TERRITORY.—Claims against the territory must be presented to the controller, with the evidence in support thereof, within two years after the same have accrued. *Crutcher v. Cram*, 372.
5. ACCOUNT STATED.—To take a case out of the statute of limitations on an account stated, the acknowledgment of the debt, or the promise to pay it, must be in writing, signed by the party to be charged thereby; and this, whether the original cause of action was or was not barred at the time of the acknowledgment or promise. *Reed v. Smith*, 533.
6. IDEM.—The stating of an account is in the nature of a new promise, depending for its validity upon the consideration of the old debt; but the evidence of such promise must be in writing, or the action will be barred by the statute of limitations. *Id.*

MECHANICS' LIENS.

TENANTS IN COMMON—JOINT LIABILITY—JUDGMENT.—Action against T. and S. for the foreclosure of mechanic's lien. The work was performed be-

tween the second of August, 1863, and the thirtieth of November, 1865. The defendants were tenants in common of the incumbered premises at the time of commencing this suit: *Held*, 1. That if the defendants were liable at all to the plaintiff, L., they were jointly, and not jointly and severally, liable; and, 2. That a separate personal money judgment could not be entered against one of the defendants, by default. *Lowe v. Turner*, 107.

MINES AND MINING.

1. **TRESPASS.**—If plaintiffs perform the acts required by law to locate a quartz claim, except the labor—the year not having expired—and the defendants undertook to take possession of the ground, they were trespassers. *Atkins v. Hendree*, 95.
2. **DEFENSE—ABANDONMENT.**—Defendants in an action for the recovery of a quartz claim may show acts of abandonment on the part of plaintiffs, or that the lode which they claim is separate and distinct from the one held by plaintiffs. *Id.*
3. **LOCATION.**—From the time that a lawful location of a quartz claim has been made, being a space of two hundred feet in length and fifty feet on each of the stakes, the claimant becomes the owner as against any other claimant of the soil embraced in those limits. *Id.*
4. The claimant is allowed to hold but one ledge by location, but the fact that other ledges may exist within those limits must first be established before a subsequent claimant has any lawful right to pass into those boundaries which otherwise must be sacred to the first location. *Id.*
5. **INSTRUCTIONS.**—The following instruction was given by the court: “No quartz claim can exceed two hundred feet in length along the lead or lode, and if the jury believe from the evidence the claim of A. was purposely located to include a greater number of feet than two hundred, then the location is an attempted fraud upon the provisions of the law and the rights of others, and the location is null and void as against subsequent locators, and the jury must find for defendants:” *Held*, that this was erroneous. To claim more than the law allows is no fraud on others, for they have the same means of ascertaining the attempted fraud that the other has of committing it. *Id.*
6. The fact of a separate and distinct lode must first be proved before the claimant of such lode is entitled to enter the bounds of a claim already located. *Id.*
7. **RECORD OF MINING CLAIM—NOTICE OF LOCATION OF MINING CLAIM.**—If one of several co-locators of a mining claim cause a notice of location of a mining claim to be recorded in the name of himself and his co-locators, in the absence of proof to the contrary, it will be presumed that the written consent of such co-locators had been seen, and a minute made thereof by the recorder, before recording such notice. *Kramer v. Settle*, 485.
8. **REPRESENTATION—WORK DONE ON MINING CLAIM—INSTRUCTION.**—The court below was requested to instruct the jury that “work done outside of a mining claim, and with direct reference to the claim, may be considered as work done on the claim.” To this the court added the following qualification: “The evidence of such work having been done should be received with great caution, and it should appear clearly that such

work was intended for the improvement of such claim, and no other," and gave the instruction so qualified: *Held*, that this was not erroneous. *Id.*

9. MINING CLAIM—REPRESENTATION BY WORK.—The failure to perform the work in a mining claim required by law, amounts to an abandonment of the claim, and thereupon it may be occupied by another. *Id.*
10. MINING LAW—DAMAGES.—In the absence of any agreement, regulation, or custom authorizing it, one person has no right to run his tail-race or sluicing-flume on to the dumping-ground of another who had a prior right thereto, and no damage can be claimed of the latter for filling up such race or flume, if he do not prevent the former from dumping on his own ground. *Ralston v. Plowman*, 595.
11. EVIDENCE.—Parol evidence can not be given of a mining custom, when there are written rules or regulations of the mining district in force on the same subject. *Id.*
12. INSTRUCTIONS.—It is erroneous to instruct a jury to find a verdict according to mining customs, "if such customs are not contrary to law." It is likewise erroneous to instruct a jury, if they believe the version of the case by one or the other party to be correct, they will find in his favor. *Id.*

MUNICIPAL CORPORATIONS.

1. JUDICIAL KNOWLEDGE—ORDINANCES.—Courts will not take judicial knowledge of city ordinances; they must be proved by the record, or by certified copies thereof. *People v. Buchanan*, 681.
2. HOUSES OF ILL-FAME—STATUTE RELATING TO.—The statute relating to houses of ill-fame in Boise city, approved January 12, 1877, delegates power to the common council of Boise city to make any ordinance on that subject; but does not directly create an offense. *People v. Ah Ho*, 691.

MURDER.

1. INDICTMENT.—A failure to set forth the title of the action in an indictment is not fatal. The statute requiring it is directory. Sufficiency of an indictment for murder considered. *People v. Walters*, 271.
2. IDEM.—An indictment for murder is sufficient if it charges the killing to have been done with malice aforethought; this is defined by lexicographers as meaning premeditated, and premeditated and deliberate are synonymous terms. *People v. Ah Choy*, 317.
3. Every homicide, unexplained, is murder; but it is the province of the jury to determine, from the evidence and circumstances before them, whether the crime be murder in the first or second degree. *People v. Walter*, 386.
4. If the defendant admitted the killing, in this case, he admitted that he was guilty of murder, if he was not insane; and it should have been submitted to the jury, under proper instructions, to say, from the evidence, whether the crime was murder in the first or second degree. *Id.*

NATIONAL BANKS.

1. BANK ACT—STATE—TERRITORY.—The word "state" wherever used by congress in the currency act of 1864, or in the amendments thereto, should be construed to mean "territory" as well, wherever the same is applicable. *People v. Moore*, 504.

2. **SHARES—TAXATION.**—When congress enacted the currency act of 1864, it intended to permit the shares in national banks, in the hands of individuals or corporations, to be taxed, wherever such associations might be organized, whether in states or territories. *Id.*
3. **IDEM.**—Congress did not intend, by the first proviso of the forty-first section of the national currency act of 1864, to require uniform taxation in all the different municipalities of a state or territory, but only that the same should be uniform in the municipality or subdivision in which the bank is located, or in which the shareholder resides. *Id.*
4. **LEGISLATIVE AUTHORITY—TAXATION.**—Congress has sufficiently authorized the legislature of this territory to pass a law requiring the taxation of national bank shares in the hands of individuals or corporations. *Id.*
5. **CONSTRUCTION—PLACE OF TAXATION.**—The limitation as to the place of taxation of bank shares, contained in the national currency act of 1864, and in the act of 1868, amendatory thereof, requiring the assessment to be made “at the place where the bank is located, and not elsewhere,” must be construed to mean the state within which the bank is located. *Id.*
6. **REVENUE LAW—TAXATION—BANK SHARES.**—The revenue law in force in 1871, did not authorize the assessment or taxation of shares of national bank stock in the hands of individuals or corporations. *Id.*

NEW TRIAL

1. **NEWLY DISCOVERED EVIDENCE—PRACTICE.**—If the newly discovered evidence brings to light some new fact bearing upon the main question at issue, and would be likely to change the result, a new trial should be granted. *Flannagan v. Newberg*, 78.
2. **REVIEW—JUDGMENT ROLL.**—In cases where no motion for a new trial was made in the court below, or where there is no statement properly made on such motion, the appellate court will only examine the judgment roll, and if this be regular, the judgment will be affirmed. *Purdy v. Steel*, 216.
3. **FINDINGS.**—It is not a ground for a new trial that the findings were not filed until after the adjournment of the term of court. *Hazard v. Cole*, 276.
4. **STATEMENT.**—A statement made on a motion for a new trial may be considered on an appeal from the judgment, for the purpose of determining whether any errors in law were committed by the court below in the progress of the trial. *Forsythe v. Richardson*, 459.
5. **EXCEPTIONS MUST BE TAKEN** to an order overruling a new trial, and preserved in the record, if a party wish to avail himself of the error in the appellate court. *Taylor v. Peterson*, 513.
6. **FINDINGS—STATEMENT—REVIEW—EXCEPTIONS.**—This court will not look into a statement with a view to determine therefrom whether the evidence will support the findings or judgment, unless the party has placed himself in a position to object to the order of the court overruling a motion for a new trial by proper exceptions, any further than it will where no appeal has been taken from such order. *Id.*
7. **EVIDENCE—CONFLICT.**—The appellate court will not disturb a judgment or verdict, or order denying a new trial, where there is a substantial con-

- flict in the testimony, and no rule of law appears to have been violated. *Mootry v. Hawley*, 543.
8. PRACTICE.—Three steps are necessary in moving for a new trial: 1. Giving notice of intention to make the motion. 2. Filing the statement or affidavits upon which the motion is to be made. 3. The application or motion. *Sterens v. N. W. Stage Co.*, 604.
 8. WAIVER.—A failure to give notice of intention to move for a new trial, or to file the statement within the time required by law, or such further time as the court or judge may, by order, grant, is a waiver of the right to move for a new trial; and the failure can only be remedied by the appearance of the opposite party without objection to such defects, at the settlement of the statement, or on the hearing of the motion. *Id.*
 9. IDEM.—In case the parties can not agree upon the statement, notice must be given for a settlement before the court or judge, by the party proposing the statement, but it must affirmatively appear that no notice was given, or this court will presume that it was given. *Id.*
 10. ORDER STAYING EXECUTION—EXTENDING TIME.—An order "that there be a stay of execution on the judgment in this case for a period of twenty days, for the purpose of allowing the defendants to move for a new trial," is not an order extending the time for giving notice of intention to move for a new trial, or for filing a statement. *Id.*
 11. STATEMENT—PRACTICE.—The statement on a motion for a new trial must be settled, before a decision on the motion, in order that the court below or judge thereof may have something definite and certain to act upon. The practice of deciding the motion, and afterwards settling the statement, condemned. *Id.*
 12. EVIDENCE, INSUFFICIENCY OF—INSTRUCTIONS—PRESUMPTIONS.—When written instructions are not given to the jury, this court will presume that the law of the case was correctly given, unless the contrary appears; but when there is a great preponderance in the weight of evidence against the verdict, this court will presume that the jury misconceived either the evidence or the law, and will order a new trial. *Monarch G. & S. M. Co. v. McLaughlin*, 617.
 13. MOTION FOR—APPEAL.—An appeal from an order granting or refusing a new trial must be taken within thirty days from the time the order is made and filed with the clerk. *Hyde v. Harkness*, 623.
 14. IDEM—STATEMENT.—A statement on a motion for a new trial can only become a part of the record by the certificate of the judge or referee who tried the case. *Id.*
 15. CONFLICT OF TESTIMONY.—When this court find upon a review that there is a substantial conflict of testimony, it will not disturb the decision of the court below refusing a new trial. If the testimony consist wholly of depositions, the rule is different, but not when a considerable portion was oral. *Ainslie v. Idaho World Printing Co.*, 641.
 16. After two concurring verdicts, the court will not grant a new trial, if the questions to be tried wholly depend upon matters of fact, and no rule of law has been violated; even though in the opinion of the court the verdict be against the weight of evidence. *Monarch G. & S. M. Co. v. McLaughlin*, 650.
 17. MOTION FOR—PRACTICE.—On a motion for a new trial, on the ground that the court denied a continuance, the moving party should procure

the affidavits of the absent witnesses showing that they can testify to the facts sought to be proven; or show sufficient reason for not obtaining such affidavits. *Lillienthal v. Anderson*, 673.

18. **IDEM—SURPRISE—EVIDENCE OF.**—On a motion for a new trial, on the ground that the party was taken by surprise by reason of one of his own witnesses failing to testify to a material fact which the witness had previously stated in the presence of others he could testify to, the affidavits of the persons in whose hearing such statements were made, are the best evidence of the surprise, and should be produced. *Id.*

NOTICE.

1. **ACTUAL.**—The lines were pointed out to the defendant by the plaintiffs with reasonable accuracy, and we see no good reason why actual notice is not equally as good so far as bringing home to the defendant a knowledge of the plaintiffs' rights, as that afforded by stakes or like monuments. *Feirbaugh v. Masterson*, 135.
2. **OBSTRUCTING OFFICER.**—While the statute requires an officer to inform a party upon whom he is about to serve criminal process of his office and purpose, this need not be done when the officer is well known to such person. *People v. Nash*, 206.
3. **RECORD, MATTERS OF.**—In respect to matters of record in which two parties are interested, they are within the knowledge of both, and neither party has a right to rely upon the recollection of the other. *Hazard v. Cole*, 276.
4. **CERTIFICATE OF SALE—FILING.**—The filing of a certificate of sale of real estate by the officer making the sale, and in the manner prescribed by statute, imparts to all the world constructive notice of the estate acquired by the purchaser under it, as well as the fact of sale and its legal consequences. *Id.*

See POSSESSION, 8.

5. **QUITCLAIM DEED.**—A purchaser of real estate who takes a quitclaim deed from his grantor, is presumed to have notice of any defects in his grantor's title; and he purchases at his own risk. *Leland v. Isenbeck*, 469.
6. **PRODUCTION OF DOCUMENTS.**—When documentary evidence which a party needs in a trial of a cause, is in the hands or under the control of the opposite party, before the latter can be required to produce it on the trial, he must have due notice thereof. When he has it in his possession, in court at the trial, notice at the time is sufficient; otherwise, to be effectual, it must be served upon him a sufficient length of time before the trial to enable him to produce it. *Alvord v. U. S.*, 585.

OFFICE AND OFFICER.

1. **PROCEEDINGS AGAINST AN OFFICER** for neglect of duty, being a personal default, will by no means involve his successor. *Beachy v. Lamkin*, 50.
2. **COUNTY COMMISSIONERS—RESIGNATION—FILLING VACANCY IN OFFICE—COMMISSIONERS.**—Under the statutes, the resignation of a county commissioner must be tendered to the board of which he is a member, and the vacancy must be filled by the commissioners. The governor has no power to fill such vacancies. *People v. Gillespie*, 52.
3. **OFFICIAL BOND.**—A bond not filling the statutory requisites, yet which is

- lawful in itself and intended to protect the public, is a good bond. *People v. Slocum*, 62.
4. **IF THE BOND** which the law required of the defendants was not given, if the one given, instead of containing all the conditions which it should have contained, was less onerous, this is no defense to the breach of those conditions to which the defendants were parties. *Id.*
 5. **STATUTORY BOND—OFFICER.**—If a person get possession of an office by usurpation only, and give a statutory or a legal bond, and a breach of its conditions be committed, he is as much liable on such bond as though he had been duly elected or appointed. *Id.*
 6. **OBSTRUCTING—NOTICE.**—While the statute requires an officer to inform a party upon whom he is about to serve criminal process of his office and purpose, this need not be done when the officer is well known to such person. *People v. Nash*, 206.
 7. **COURTS.**—Courts will take official cognizance of their own officers. *People v. Butler*, 231.
 8. **TERM OF OFFICE.**—The right of an officer to hold office until his successor is elected and qualified, is as much a part of his estate in the office as the original term for which he was elected. *People v. Green*, 235.
 9. **REQUISITION—AGENT.**—The position of an agent named in a requisition to receive and return a fugitive from justice, is an office; and such officer is entitled to the fees and emoluments fixed by law for his services. *Settle v. Sterling*, 259.
 10. **TERRITORIAL TREASURER.**—The territorial treasurer must pay the territorial indebtedness in such funds as he receives. He can not legally pay in any other funds. *Crutcher v. Sterling*, 306.
 11. **COLLECTORS OF TAXES.**—The tax collectors of the several counties in the territory have no right to demand the payment of taxes in gold coin, or in anything but the legal currency of the United States at its par value; and they must pay over the same kind of funds received by them. *Id.*
 12. **CONTROLLER.**—It is the duty of the controller to carefully examine all claims against the territory presented to him for allowance, and if he is not satisfied that such claim is correct, or if it be not presented within two years from the time it accrued, he may reject it, notwithstanding the certificate of the prison commissioner stating that it is correct. *Crutcher v. Cram*, 372.
 13. **DISTRICT ATTORNEY OF THE UNITED STATES.**—Congress having failed to provide that this officer should prosecute in cases arising under territorial laws, he can act as prosecuting attorney only when the courts are exercising jurisdiction as circuit and district courts of the United States. *People v. Heed*, 402.
 14. **PRESUMPTION.**—Every officer is presumed to do his duty. *People v. Owyhee Lumber Co.*, 420.
 15. **ASSESSOR—TAX COLLECTOR—OFFICIAL OATH.**—An assessor and tax collector, whose oath of office as both assessor and tax collector is indorsed on his bond as assessor, is not required to take another oath as tax collector when he files his bond as tax collector. *Gorman v. County Commissioners*, 553.
 16. **OFFICIAL BOND—APPROVAL OF COMMISSIONERS.**—It is the duty of the board of county commissioners to approve the bond of an assessor and

tax collector *pro forma*, if, upon its face, it is *prima facie* good. The board may, at any time afterwards, cite the sureties, to make a further justification, and, in case it is deemed insufficient, may cite the officer to show cause why his office should not be declared vacant. *Id.*

17. **TAX COLLECTOR—OFFICIAL BOND.**—A tax collector is not required, by statute, to give a bond with sureties in double the amount of the whole penal sum of his bond. *Id.*
18. **INTENDMENTS.**—Every intendment of the law is to be taken in favor of those whom the people have elected to serve in an official capacity. Courts should not seek an excuse to defeat the will of the people, but rather to carry out and perfect it. *Id.*
19. **FEES.**—A. was duly elected to the office of assessor and tax collector, and presented his bond for approval to the county commissioners, who refused to accept it, and thereupon appointed B. to fill the office. B. duly qualified, collected the taxes, and received compensation therefor: *Held*, that A., on being restored to office, could not recover from the county the fees to which he would have been entitled if in office. *Gorman v. County Commissioners*, 655.
20. **IDEM.**—The right to compensation is an incident to the services rendered, and not to the office. *Id.*
21. **OFFICER DE FACTO.**—The incumbent of an office, though only an officer *de facto* under color of right, is alone entitled to compensation for the services performed by him. *Id.*
22. **QUALIFICATIONS TO HOLD OFFICE.**—If a person elected to a county office is not qualified to hold and enter into the same, at the time fixed by law therefor, the office is vacant and may be filled by appointment. *People v. Curtis*, 753.

OFFICIAL BONDS.

1. **A BOND NOT FILLING THE STATUTORY REQUISITES**, yet which is lawful in itself and intended to protect the public, is a good bond. *People v. Slocum*, 62.
2. **IF THE BOND** which the law required of the defendants was not given, if the one given, instead of containing all the conditions which it should have contained, was less onerous, this is no defense to the breach of those conditions to which the defendants were parties. *Id.*
3. **STATUTORY BOND—OFFICER.**—If a person get possession of an office by usurpation only, and give a statutory or a legal bond, and a breach of its conditions be committed, he is as much liable on such bond as though he had been duly elected or appointed. *Id.*
4. **SURETIES.**—The sum set opposite the names of the respective parties subscribing a bond joint and several by its terms, is intended to show the sums for which they intend to justify and to fix their liabilities towards each in the event of the collection of the penalty. *Id.*
5. **APPROVAL OF COMMISSIONERS.**—It is the duty of the board of county commissioners to approve the bond of an assessor and tax collector *pro forma*, if, upon its face, it is *prima facie* good. The board may, at any time afterwards, cite the sureties, to make a further justification, and, in case it is deemed insufficient, may cite the officer to show cause why his office should not be declared vacant. *Gorman v. County Commissioners*, 553.

6. **TAX COLLECTOR.**—A tax collector is not required, by statute, to give a bond with sureties in double the amount of the whole penal sum of his bond. *Id.*
7. **CONVERSION.**—In an action upon an official bond for a breach of duty, an allegation that the defendant unlawfully converted money to his own use, does not change the action into one of tort. *Alvord v. U. S.*, 585.

ORDER.

APPEAL—APPEALABLE ORDER.—An order overruling a motion for a stay of proceedings under a void judgment may be appealed from, or brought to this court for review, by writ of error; and such appeal brings under review the whole record in the case. *Alexander v. Leland*, 425.

ORGANIC ACT.

1. **CRIMINAL LAW JURISDICTION—JUSTICES' COURTS—LEGISLATIVE POWER.**—The legislature has no power, under the organic act, to authorize a justice of the peace to try a criminal case in which the fine or penalty exceeds, or may exceed, one hundred dollars. *People v. Maxon*, 330.
2. **UNITED STATES DISTRICT ATTORNEY.**—The United States district attorney has no right, power, or authority, except that conferred upon him by law prescribing his duties. The designation of "attorney for said territory," as used in our organic act, is synonymous with that of "the attorney of the United States," in the organic act of Washington territory. *People v. Heed*, 402.

PARDON.

LEGISLATIVE POWER.—An act of the legislative assembly of the territory remitting the penalty imposed in a criminal action, duly approved by the governor, is equivalent to a pardon. *People v. Stewart*, 546.

PARTIES.

1. **CONTRACT—PARTY PLAINTIFF.**—When a contract is made with a party in which another has a beneficial and resulting interest, the party with whom the contract was made has the right to recover though he allege the injury only to be to the stranger to the instrument or contract. *People v. Slocum*, 62.
2. **CAPACITY TO SUE.**—The people have the legal capacity to sue upon breaches of bonds given by defendants in criminal actions. *People v. Bugbee*, 88.
3. **AMENDING BY ADDING.**—The district court has the right at any time to call in other parties, or to cause the proceedings to be amended in that particular by striking out or adding the names of any parties, which may be necessary to accomplish the ends of justice and secure the interests of all. *Oro Fino M. Co. v. Cullen*, 113.
4. **JOINT CONTRACT.**—All parties jointly liable on a contract must be made defendants in an action on the contract. *People v. Sloper*, 158.
5. **WRIT OF ERROR.**—A writ of error may be sued out, under the statute, by one or more of several defendants, without joining their co-defendants in the writ. *Alexander v. Leland*, 425.
6. In an action to settle rights under the town-site act, the mayor of the city is not a necessary party. *Forsythe v. Richardson*, 459.
7. **EQUITY—MULTIPLICITY OF SUITS.**—The doctrine of the interposition of a court of equity to prevent a multiplicity of suits can not be maintained

where there is simply a multitude of individuals, plaintiffs, whose several interests are not dependent upon one another. *Wilkerson v. Wallers*, 564.

8. **COLLATERAL ATTACKS—ADMINISTRATOR.**—Where an administrator of a deceased person's estate brings an action upon a promissory note due the estate, the authority of such administrator can not be attacked by the defendant, on the grounds that his appointment was irregularly made. Having no interest in the estate, it is a matter of no importance to the defendants, if they would be protected from a second payment of the same sum. *Gledenning v. McNutt*, 592.
9. **COUNTY.**—A county can not be made a party in an appeal from an order of the board of commissioners. It can only be proceeded against by an action under the provisions of the statute which authorizes suits against a county. *Gorman v. County Commissioners*, 627.
10. **ASSIGNEE.**—The assignee of a chose in action is in all cases the proper party to sue. *Brumback v. Oldham*, 709.
11. **ASSIGNEE.**—The assignee of an account may bring an action upon it, in his own name, though the assignor retain an interest in it. *Id.*
12. **"ADVERSE PARTY" DEFINED.**—The term "adverse party" in section 201 of our civil practice act has the same signification as to matters deemed excepted to as the term "aggrieved party," in section 436 of the same act. *Fox v. West*, 782.

PERSONAL PROPERTY.

1. **STATUTE OF FRAUDS—CHANGE OF POSSESSION.**—The statute of frauds does not require personal property to be removed from the place where situated when sold. It does not in any sense refer to the place, but to the actual and continued change of possession. *Hazard v. Cole*, 276.
2. **CLAIM AND DELIVERY.**—To support an action of claim and delivery, the property must be a personal chattel at the time of the taking, and not something which has been turned into a chattel by reason of having been separated from the freehold by the defendant. *Hull v. Hull*, 361.

PLACE OF TRIAL.

1. **CHANGING—PRACTICE.**—The question of changing the place of trial in order that the defendant may have an impartial trial, involves an issuable fact, and when an application is made for that purpose upon affidavits, it is proper to admit counter-affidavits to enable the court to judge of the necessity for such change. *Hyde v. Harkness*, 601.
2. **IDEM—BURDEN OF PROOF.**—The burden of showing that an impartial trial can not be had is on the party making the application, and even if there is a slight preponderance of evidence in favor of the application, this court will not reverse the action of the court below for that reason. *Id.*
3. **IDEM—DISCRETION.**—Granting a change of venue is a matter in the sound discretion of the court, and will not be reviewed except in cases of abuse. *Id.*
4. The convenience of witnesses residing in a neighboring state will not entitle a party to a change of the place of trial. *Shirley v. Nodine*, 696.
5. **IDEM—PRACTICE.**—An affidavit stating that a party believes the convenience of witnesses will be promoted by a change of the place of trial, is not sufficient without showing upon what grounds such belief is founded. *Id.*

6. **IDEM.**—The mere statement, in an affidavit, of a belief that the witness residing in an adjoining state will voluntarily attend, is not sufficient to entitle a party to a change of the place of trial. *Id.*
7. **CHANGING VENUE.**—After two jury trials without a verdict, a motion to change the place of trial should not be granted, unless it be clearly established that a fair and impartial trial could not be had in the county of defendant's residence. *Sommercamp v. Catlow*, 716.
8. Congress having, by law, given the district courts of the territory jurisdiction of offenses against the laws of the United States, and having given the justices of the supreme court power to fix the times and places of holding district courts; by so fixing them they have also fixed the place of trial of offenses against the laws of the United States. Congress, therefore, having, by means of the power thus delegated, fixed the place of trial, has disposed of all questions of jurisdiction of the court, as well as all objections to the jury as not being drawn from the vicinage. *U. S. v. Mays*, 763.

PLEADING.

1. **CAUSES OF ACTION—JOINDER.**—The rule under the code allows a party to state as many causes of action as he may have, if they are of a character to be properly combined in the same complaint, but it does not permit a party to set out the same causes under different forms. *People v. Slocum*, 62.
2. **VARIANCE—PROOFS.**—It is considered no variance from the proof if the facts show a substantial right to recover under the allegations, and the necessity of having various forms of stating the same cause of action is thus fully obviated. *Id.*

See JUDGMENT, 6.

3. **CHANCERY.**—The old rules of chancery pleading are abolished by the code. *W'a Ching v. Constantine*, 266.
4. **IDEM—EQUITABLE DEFENSE.**—Under the provisions of section 49 of the code, an equitable defense may be pleaded to a legal cause of action. *Id.*
5. **COMPLAINT—RECOGNIZANCE.**—An allegation in a complaint, that "a recognizance was made and duly delivered" must be held to mean that it was returned to the clerk of the court, as required by law; and such allegation is sufficient. *People v. Myers*, 356.
6. **COMPLAINT—PLEADING.**—If the property claimed be so mixed with other property that a delivery of the specific article can not be made, and the plaintiff fails to ask judgment for its value in case it can not be delivered, the action of claim and delivery can not be maintained. *Hull v. Hull*, 361.
7. **AMENDED.**—When an amended complaint is filed, it takes the place of the original, and all subsequent proceedings in the case are based upon the amended pleading. *People v. Hunt*, 433.
8. **VERIFICATION.**—When the complaint is not verified, the answer need not be verified. *Id.*
9. **ESTOPPEL—INSTRUCTIONS.**—A party to an action can not avail himself of the benefits of an estoppel, unless he plead it. It is error for the court to submit such question to the jury by instruction, unless it be pleaded. *Leland v. Isenback*, 469.
10. **DEMURRER—COMPLAINT.**—The objection that a complaint does not state

facts sufficient to constitute a cause of action, is never waived. *Great-house v. Heed*, 482.

11. ANSWER—DEMURRER.—When a defendant in an action demurs within ten days after service of summons upon him, he has answered within meaning of the statute; and no judgment for want of an answer can be rendered against him. *Leggett v. Meyers*, 548.
12. VERIFICATION—ANSWER—DENIALS.—When the complaint is verified, the answer must deny, specifically, every material allegation of the complaint, but need not traverse mere matters of surplusage. *Pence v. Durbin*, 550.
13. ANSWER—DENIALS.—A denial of the literal truth of the allegations of a complaint, and not a denial of every specific averment in it, is evasive. A failure to deny, specifically, each and every material allegation of a verified complaint, admits the allegations not so denied. *Norris v. Glenn*, 590.
14. AGREEMENT—PRESUMPTIONS.—Unless an agreement appears from the complaint to have been verbal, the court will presume that it was in writing, where the nature of the agreement is such that it could not be valid unless in writing. *Bowman v. Ainslie*, 644.
15. LACHES—DEFECTIVE COMPLAINT.—No laches is imputable to a defendant for not interposing objections to the complaint at the first opportunity, when it appears that the plaintiff is not entitled to recover. *Gorman v. County Commissioners*, 655.
16. ON SUPERSEDEAS BONDS.—In an action upon a *supersedeas* bond in a case wherein the proceedings have been staid by the bond, it is not necessary to allege or prove that the action in which the bond was given, was an appealable one. *Ray v. Ray*, 705.
17. ASSIGNMENT—CONSIDERATION.—The consideration of an assignment need not be alleged or proved. *Brumback v. Oltham*, 709.
18. CHAMPERTY.—Unless champerty be alleged in the pleadings, it can not be considered. *Id.*
19. CLAIM AND DELIVERY—NEW MATTER.—When, in an action in claim and delivery for the recovery of personal property, the complaint alleges ownership and a right to the possession, the answer denying these allegations, it is not error in the court to allow the defendant to prove his right to the possession by virtue of a lien to defeat a recovery by plaintiff. The establishment of such right by defendant is not new matter required to be affirmatively pleaded. *Lindsay v. Wyatt*, 738.
20. DENIALS UPON INFORMATION AND BELIEF.—A denial in an answer of the material averments of the complaint, upon information and belief, is sufficient to raise an issue to be tried, if the facts are not within the personal knowledge of the answering defendant. *People v. Curtis*, 753.
21. PRACTICE.—Under the code of procedure a defendant is not only permitted, but is required to set up all matters of defense, by answer in the original action, whether such matters are legal or equitable in their character. *Utah & N. R. Co. v. Crawford*, 770.

POSSESSION.

1. POSSESSORY RIGHTS—EVIDENCE OF TITLE.—It is a well-settled rule in relation to possessory rights that prior possession is *prima facie* evidence of title. *Feirbaugh v. Masterson*, 135.

6. **IDEM.**—The mere statement, in an affidavit, of a belief that the witness residing in an adjoining state will voluntarily attend, is not sufficient to entitle a party to a change of the place of trial. *Id.*
7. **CHANGING VENUE.**—After two jury trials without a verdict, a motion to change the place of trial should not be granted, unless it be clearly established that a fair and impartial trial could not be had in the county of defendant's residence. *Sommercamp v. Catlow*, 716.
8. Congress having, by law, given the district courts of the territory jurisdiction of offenses against the laws of the United States, and having given the justices of the supreme court power to fix the times and places of holding district courts; by so fixing them they have also fixed the place of trial of offenses against the laws of the United States. Congress, therefore, having, by means of the power thus delegated, fixed the place of trial, has disposed of all questions of jurisdiction of the court, as well as all objections to the jury as not being drawn from the vicinage. *U. S. v. Mays*, 763.

PLEADING.

1. **CAUSES OF ACTION—JOINDER.**—The rule under the code allows a party to state as many causes of action as he may have, if they are of a character to be properly combined in the same complaint, but it does not permit a party to set out the same causes under different forms. *People v. Slocum*, 62.
 2. **VARIANCE—PROOFS.**—It is considered no variance from the proof if the facts show a substantial right to recover under the allegations, and the necessity of having various forms of stating the same cause of action is thus fully obviated. *Id.*
- See JUDGMENT, 6.
3. **CHANCERY.**—The old rules of chancery pleading are abolished by the code. *Wa Ching v. Constantine*, 266.
 4. **IDEM—EQUITABLE DEFENSE.**—Under the provisions of section 49 of the code, an equitable defense may be pleaded to a legal cause of action. *Id.*
 5. **COMPLAINT—RECOGNIZANCE.**—An allegation in a complaint, that "a recognizance was made and duly delivered" must be held to mean that it was returned to the clerk of the court, as required by law; and such allegation is sufficient. *People v. Myers*, 356.
 6. **COMPLAINT—PLEADING.**—If the property claimed be so mixed with other property that a delivery of the specific article can not be made, and the plaintiff fails to ask judgment for its value in case it can not be delivered, the action of claim and delivery can not be maintained. *Hull v. Hull*, 361.
 7. **AMENDED.**—When an amended complaint is filed, it takes the place of the original, and all subsequent proceedings in the case are based upon the amended pleading. *People v. Hunt*, 433.
 8. **VERIFICATION.**—When the complaint is not verified, the answer need not be verified. *Id.*
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 10. **DEMURRER—COMPLAINT.**—The objection that a complaint does not state

2. PRIOR.—To entitle a party to hold by right of prior possession, there must be an actual, *bona fide* occupation, a *possessio pedis*, a subjection to the will and control. *Id.*
3. It is not necessary that the occupant should cultivate the property claimed. It is sufficient if it be subjected to his use in the manner pointed out. Neither is any particular kind of inclosure required where a party is in possession of the land marked by distinct monuments of boundary, whether the same be a natural or an artificial inclosure. Claiming a title to the whole tract, the possession of the part so occupied will draw after it the possession of the whole. *Id.*
4. PUBLIC LANDS—ACTUAL.—In relation to public lands which are not mineral lands, the title, as between citizens of the territory, where neither connects himself with the government, is considered as vested in the first possessor, and to proceed from him. This possession must be actual, and not constructive. *Id.*
5. PRIOR—ACTUAL.—Where reliance is placed upon the prior possession of the plaintiff, or of parties through whom he claims, such possession must be shown to have been actual in him or them. By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. *Id.*
6. Having gone into the actual possession of a portion of the premises, they were entitled to a reasonable length of time in which to inclose them. What this length of time should be must, for the most part, depend upon the particular circumstances and locality of each claim. *Id.*
7. OF PART.—If a party were to locate and claim for agricultural purposes a tract of land, and were to reside upon, inclose, and cultivate a portion of the same, having artificial monuments sufficient to indicate generally the boundaries of the entire claim, this would most certainly be a substantial compliance with the rule, and such possession of a part would draw after it the possession of the whole. *Id.*
8. PUBLIC LANDS.—If the public lands of the United States are claimed by virtue of possession alone, the claimant is bound to take such precautionary steps as will advise all the world of his rights. *Forsythe v. Richardson*, 459.
9. DAMAGES—OF LAND.—The lawful possession of land is all that is required to enable a plaintiff to recover damages for building a dam across a watercourse running through such land, by reason whereof the water is thrown back upon the land of plaintiff. *Norris v. Glenn*, 590.
10. An occupancy of one legal subdivision does not draw to it another legal subdivision, though contiguous to or immediately adjoining it. *Thompson v. Holbrook*, 609.

POSSESSORY RIGHTS.

1. PRIOR POSSESSION—EVIDENCE OF TITLE.—It is a well-settled rule in relation to possessory rights that prior possession is *prima facie* evidence of title. *Fairbaugh v. Masterson*, 135.
2. IT IS NOT NECESSARY THAT THE OCCUPANT SHOULD CULTIVATE the property claimed. It is sufficient if it be subjected to his use in the manner pointed out. Neither is any particular kind of inclosure required where

is in possession of the land marked by distinct monuments of any, whether the same be a natural or an artificial inclosure. Having a title to the whole tract, the possession of the part so occupied will draw after it the possession of the whole. *Id.*

PRACTICE.

CERTIFICATE.—The certificate of the clerk of the district court that "judgment has been duly appealed" will not cure any defects in the record. It is for the court to determine that question from the facts. *Moore v. Koubly*, 55.

GENERAL APPEARANCE—WAIVER.—A party appearing generally, in a suit or proceeding, thereby cures whatever defects may exist in the original process which brought him into court. *Id.*

GENERAL APPEARANCE in an action is as effectual for any purpose as a special appearance. *Id.*

JOINDER OF ACTIONS—PLEADING—JOINDER.—The rule under the code allows a party to state as many causes of action as he may have, if they are of the same character to be properly combined in the same complaint, but it does not permit a party to set out the same causes under different forms. *Slocum*, 62.

RETRIAL—NEWLY DISCOVERED EVIDENCE.—If the newly discovered evidence brings to light some new fact bearing upon the main question at issue and would be likely to change the result, a new trial should be granted. *Flannagan v. Newberg*, 78.

PEOPLE'S RIGHT TO SUE.—The people have the legal capacity to sue upon the bonds of bonds given by defendants in criminal actions. *People v. [illegible]*, 8.

REVERSAL OF JUDGMENT.—It is error to enter judgment against one of the defendants, when the judgment has been sustained a demurrer to the complaint upon the ground that the complaint "does not state facts sufficient to constitute a cause of action," without first amending the same. *Lowe v. Turner*, 107.

REVERSAL OF JUDGMENT—SAKE OF HARMONIZING THE PRACTICE in legal and equitable proceedings, in order to give effect to the spirit of our code, we incline to the opinion that the practice is, to proceed against a decree in order to annul or set aside in the same manner as against a judgment entered in a court of law. *Oro Fino M. Co. v. Cullen*, 113.

REVERSAL OF JUDGMENT—INJUNCTION.—A party denying the allegations of a bill in equity and desiring to procure the dissolution of an injunction on the ground that he has not having denied the equities of such bill, must controvert directly every material allegation of such bill; he must not undertake to deny the facts, must not confess and avoid. It must simply be a plain, unequivocal denial. *Id.*

REVERSAL OF JUDGMENT—THE WHOLE EQUITY OF THE COMPLAINT IS DENIED by the answer, if the defendant is entitled to a dissolution of the injunction *pendente lite* if the plaintiff's title is established by proper evidence on the hearing of the cause. But to have this effect the denial of such equities must be full and specific, and must cover the whole ground. *Id.*

REVERSAL OF JUDGMENT—ARE ADMITTED WHICH QUALIFY a general denial; if the denials are specifically made; or if, on examination of the circumstances, the court is satisfied that the facts warrant the continuance of the injunction notwithstanding.

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PRACTICE.

1. **CLERK'S CERTIFICATE.**—The certificate of the clerk of the district court that the "judgment has been duly appealed" will not cure any defects in the record. It is for the court to determine that question from the record. *Moore v. Koubly*, 55.
2. **APPEARANCE—WAIVER.**—A party appearing generally, in a suit or proceeding, thereby cures whatever defects may exist in the original process to bring him into court. *Id.*
3. **A VOLUNTARY APPEARANCE** in an action is as effectual for any purpose as due service of process. *Id.*
4. **CAUSES OF ACTION—PLEADING—JOINDER.**—The rule under the code allows a party to state as many causes of action as he may have, if they are of a character to be properly combined in the same complaint, but it does not permit a party to set out the same causes under different forms. *People v. Slocum*, 62.
5. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—If the newly discovered evidence brings to light some new fact bearing upon the main question at issue, and would be likely to change the result, a new trial should be granted. *Flannagan v. Newberg*, 78.
6. **CAPACITY TO SUE.**—The people have the legal capacity to sue upon breaches of bonds given by defendants in criminal actions. *People v. Bugbee*, 88.
7. **JUDGMENT.**—It is error to enter judgment against one of the defendants, after having sustained a demurrer to the complaint upon the ground that such pleading "does not state facts sufficient to constitute a cause of action," without first amending the same. *Lowe v. Turner*, 107.
8. **FOR THE SAKE OF HARMONIZING THE PRACTICE** in legal and equitable cases, and to give effect to the spirit of our code, we incline to the opinion that the practice is, to proceed against a decree in order to annul or set it aside in the same manner as against a judgment entered in a court of law. *Oro Fino M. Co. v. Cullen*, 113.
9. **DISSOLVING INJUNCTION.**—A party denying the allegations of a bill in equity, and desiring to procure the dissolution of an injunction on the ground of having denied the equities of such bill, must controvert directly every material allegation of such bill; he must not undertake to set up new facts, must not confess and avoid. It must simply be a plain, direct, unequivocal denial. *Id.*
10. **WHEN THE WHOLE EQUITY OF THE COMPLAINT IS DENIED** by the answer, the defendant is entitled to a dissolution of the injunction *pendente lite* until the plaintiff's title is established by proper evidence on the hearing of the cause. But to have this effect the denial of such equities must be full and specific, and must cover the whole ground. *Id.*
11. **IF FACTS ARE ADMITTED WHICH QUALIFY** a general denial; if the denials be evasively made; or if, on examination of the circumstances, the court deem that the facts warrant the continuance of the injunction notwith-

- standing a formal denial may have been made, the rule will not be applied. *Id.*
12. **EXCEPTIONS.**—It is undoubtedly the general rule that when a party seeks to reverse a judgment rendered in the inferior court, he must except to the ruling of the court and assign the error in this court on appeal. *Lamkin v. Sterling*, 120.
13. **THE EXCEPTIONS TO THE RULE** that exceptions must be first taken in the court below are where a complaint is so radically defective that it discloses no cause of action and will not support a judgment; and where a judgment has been taken by default and the appellant could not except by reason of his non-appearance, and who was bound to see that the proceedings were regular and legal. *Id.*
14. **THERE IS NO RULE OF PRACTICE GOVERNING LEGAL PROCEEDINGS** more clearly defined, nor better settled, than that any objections of whatever character, whether with reference to the regularity of the proceedings on the trial of the cause, or to error of law committed by the judge in relation to a motion, or of any ruling whatever on a question of law arising during the proceedings, must be taken at once, at the time when the question arises. *Id.*
15. **EQUITABLE JURISDICTION—LEGAL JURISDICTION.**—Legal and equitable relief may be sought in the same action, and by the same complaint, but the grounds therefor must be distinctly and separately stated. *Wa Ching v. Constantine*, 266.
16. **APPEAL.**—Upon an appeal from a judgment, without a statement or bill of exceptions, nothing can be considered but the judgment roll. *Gamble v. Dunwell*, 268.
17. **APPEALS—WRITS OF ERROR—BILLS OF EXCEPTION.**—The legislative assembly has authority to regulate the mode of taking and allowing writs of error, bills of exception, and appeals; and such regulations, when made, apply to all cases, whether arising under the laws of the United States, or of the territory. *U. S. v. Gilson*, 364.
18. **APPEAL—NOTICE OF APPEAL—UNDERTAKING ON APPEAL.**—Three things are necessary in order to perfect an appeal, and to give the supreme court jurisdiction. 1. A notice of appeal must be filed as required by law. 2. A copy of the notice must be served on the adverse party or his attorney. 3. An undertaking must be filed within five days after filing notice of the appeal. *Shissler v. Crooks*, 369.
19. **A FAILURE BY PLAINTIFF TO DENY**, by affidavit, the genuineness and due execution of an instrument in writing set forth in the answer as the foundation of the defense, does not preclude the plaintiff from showing, on the trial, that it was procured by fraud or misrepresentation. *Cox v. N. W. Stage Co.*, 376.
20. **CERTIORARI.**—Three things are necessary to be shown to warrant the granting of a writ of certiorari to the district judge: 1. That the judge exceeded his jurisdiction. 2. That there is no appeal. 3. That there is no other plain, speedy, and adequate remedy. *People v. Lindsay*, 394.
21. **DISMISSING WRIT.**—A writ of certiorari improperly granted, will be dismissed on motion. *Id.*
22. **CERTIORARI.**—Certiorari will not lie until the case has been finally disposed of in the inferior court. *Id.*
23. **EVIDENCE—ERROR.**—It is not error for the court below to admit im-

proper evidence, such as a sheriff's deed, without first showing a valid judgment, unless objection be made to its introduction. *Leland v. Isenbeck*, 469.

24. REFEREE.—The only order under which a referee can act, is the one duly made and entered of record before he enters upon his duties; to that he must look for his authority, and he can not go beyond it. *Taylor v. Peterson*, 513.
25. AMENDMENTS.—An order appointing a referee may not be amended against objections, after such referee has acted, so as to make valid acts not authorized by the original order appointing him and prescribing his duties. *Id.*

See NEW TRIAL, 5, 6.

26. BILLS OF REVIEW.—After a defendant has demurred to a bill of review, he can not raise an objection to the right of the plaintiff to file it. To avail himself of such objection, he should move the court, on his first appearance, to strike the bill from the files, or to dismiss the suit. *Hyde v. Lamberson*, 539.
27. ANSWER—DEMURRER—PLEADING.—When a defendant in an action demurs within ten days after service of summons upon him, he has answered within meaning of the statute; and no judgment for want of an answer can be rendered against him. *Leggett v. Meyers*, 548.
28. CAUSES OF ACTION.—Those causes of action growing directly out of the breach of an undertaking can be the subject of but one action. *Pence v. Durbin*, 550.
29. ANSWER—WAIVER.—An answer by a party, after the overruling of his demurrer, waives all defects in the complaint, except those which may properly be taken advantage of on a motion in arrest of judgment. *Id.*
30. DEFECTIVE VERIFICATION—MOTION TO STRIKE OUT.—An answer can not be disregarded because of a defective verification. A judgment rendered on the pleadings upon the grounds of such defect, is erroneous. The only proper mode of reaching such a defect is by a motion to strike out. *Id.*
31. VERIFICATION.—A verification of a pleading made by a person not a party to the action is sufficient if it shows any statutory reason why it is not made by a party to the action. *Id.*
32. DUE DILIGENCE.—Where a witness is beyond the reach of the process of the court, a party desiring his testimony must sue out a commission to take his deposition, and a failure to do so shows a want of due diligence and a neglect to use the proper means to obtain the evidence. *Alvord v. U. S.*, 585.
33. PRODUCTION OF DOCUMENTS—NOTICE.—When documentary evidence which a party needs in the trial of a cause, is in the hands or under the control of the opposite party, before the latter can be required to produce it on the trial, he must have due notice thereof. When he has it in his possession, in court at the trial, notice at the time is sufficient; otherwise, to be effectual, it must be served upon him a sufficient length of time before the trial to enable him to produce it. *Id.*
34. JUDGMENT ON THE PLEADINGS.—If the allegations of a complaint are not denied by the defendant, the plaintiff is entitled to a judgment on the pleadings, without any proof on his part. *Id.*
35. APPEAL—NOTICE.—An appeal to the supreme court can not be taken ex-

- lawful in itself and intended to protect the public, is a good bond. *People v. Slocum*, 62.
4. **IF THE BOND** which the law required of the defendants was not given, if the one given, instead of containing all the conditions which it should have contained, was less onerous, this is no defense to the breach of those conditions to which the defendants were parties. *Id.*
 5. **STATUTORY BOND—OFFICER.**—If a person get possession of an office by usurpation only, and give a statutory or a legal bond, and a breach of its conditions be committed, he is as much liable on such bond as though he had been duly elected or appointed. *Id.*
 6. **OBSTRUCTING—NOTICE.**—While the statute requires an officer to inform a party upon whom he is about to serve criminal process of his office and purpose, this need not be done when the officer is well known to such person. *People v. Nash*, 206.
 7. **COURTS.**—Courts will take official cognizance of their own officers. *People v. Butler*, 231.
 8. **TERM OF OFFICE.**—The right of an officer to hold office until his successor is elected and qualified, is as much a part of his estate in the office as the original term for which he was elected. *People v. Green*, 235.
 9. **REQUISITION—AGENT.**—The position of an agent named in a requisition to receive and return a fugitive from justice, is an office; and such officer is entitled to the fees and emoluments fixed by law for his services. *Settle v. Sterling*, 259.
 10. **TERRITORIAL TREASURER.**—The territorial treasurer must pay the territorial indebtedness in such funds as he receives. He can not legally pay in any other funds. *Crutcher v. Sterling*, 306.
 11. **COLLECTORS OF TAXES.**—The tax collectors of the several counties in the territory have no right to demand the payment of taxes in gold coin, or in anything but the legal currency of the United States at its par value; and they must pay over the same kind of funds received by them. *Id.*
 12. **CONTROLLER.**—It is the duty of the controller to carefully examine all claims against the territory presented to him for allowance, and if he is not satisfied that such claim is correct, or if it be not presented within two years from the time it accrued, he may reject it, notwithstanding the certificate of the prison commissioner stating that it is correct. *Crutcher v. Cram*, 372.
 13. **DISTRICT ATTORNEY OF THE UNITED STATES.**—Congress having failed to provide that this officer should prosecute in cases arising under territorial laws, he can act as prosecuting attorney only when the courts are exercising jurisdiction as circuit and district courts of the United States. *People v. Heed*, 402.
 14. **PRESUMPTION.**—Every officer is presumed to do his duty. *People v. Owyhee Lumber Co.*, 420.
 15. **ASSESSOR—TAX COLLECTOR—OFFICIAL OATH.**—An assessor and tax collector, whose oath of office as both assessor and tax collector is indorsed on his bond as assessor, is not required to take another oath as tax collector when he files his bond as tax collector. *Gorman v. County Commissioners*, 553.
 16. **OFFICIAL BOND—APPROVAL OF COMMISSIONERS.**—It is the duty of the board of county commissioners to approve the bond of an assessor and

tax collector *pro forma*, if, upon its face, it is *prima facie* good. The board may, at any time afterwards, cite the sureties, to make a further justification, and, in case it is deemed insufficient, may cite the officer to show cause why his office should not be declared vacant. *Id.*

17. **TAX COLLECTOR—OFFICIAL BOND.**—A tax collector is not required, by statute, to give a bond with sureties in double the amount of the whole penal sum of his bond. *Id.*
18. **INTENDMENTS.**—Every intendment of the law is to be taken in favor of those whom the people have elected to serve in an official capacity. Courts should not seek an excuse to defeat the will of the people, but rather to carry out and perfect it. *Id.*
19. **FEES.**—A. was duly elected to the office of assessor and tax collector, and presented his bond for approval to the county commissioners, who refused to accept it, and thereupon appointed B. to fill the office. B. duly qualified, collected the taxes, and received compensation therefor: *Held*, that A., on being restored to office, could not recover from the county the fees to which he would have been entitled if in office. *Gorman v. County Commissioners*, 655.
20. **IDEM.**—The right to compensation is an incident to the services rendered, and not to the office. *Id.*
21. **OFFICER DE FACTO.**—The incumbent of an office, though only an officer *de facto* under color of right, is alone entitled to compensation for the services performed by him. *Id.*
22. **QUALIFICATIONS TO HOLD OFFICE.**—If a person elected to a county office is not qualified to hold and enter into the same, at the time fixed by law therefor, the office is vacant and may be filled by appointment. *People v. Curtis*, 753.

OFFICIAL BONDS.

1. **A BOND NOT FILLING THE STATUTORY REQUISITES**, yet which is lawful in itself and intended to protect the public, is a good bond. *People v. Slocum*, 62.
2. **IF THE BOND** which the law required of the defendants was not given, if the one given, instead of containing all the conditions which it should have contained, was less onerous, this is no defense to the breach of those conditions to which the defendants were parties. *Id.*
3. **STATUTORY BOND—OFFICER.**—If a person get possession of an office by usurpation only, and give a statutory or a legal bond, and a breach of its conditions be committed, he is as much liable on such bond as though he had been duly elected or appointed. *Id.*
4. **SURETIES.**—The sum set opposite the names of the respective parties subscribing a bond joint and several by its terms, is intended to show the sums for which they intend to justify and to fix their liabilities towards each in the event of the collection of the penalty. *Id.*
5. **APPROVAL OF COMMISSIONERS.**—It is the duty of the board of county commissioners to approve the bond of an assessor and tax collector *pro forma*, if, upon its face, it is *prima facie* good. The board may, at any time afterwards, cite the sureties, to make a further justification, and, in case it is deemed insufficient, may cite the officer to show cause why his office should not be declared vacant. *Gorman v. County Commissioners*, 553.

6. **TAX COLLECTOR.**—A tax collector is not required, by statute, to give a bond with sureties in double the amount of the whole penal sum of his bond. *Id.*
7. **CONVERSION.**—In an action upon an official bond for a breach of duty, an allegation that the defendant unlawfully converted money to his own use, does not change the action into one of tort. *Alvord v. U. S.*, 585.

ORDER.

APPEAL—APPEALABLE ORDER.—An order overruling a motion for a stay of proceedings under a void judgment may be appealed from, or brought to this court for review, by writ of error; and such appeal brings under review the whole record in the case. *Alexander v. Leland*, 425.

ORGANIC ACT.

1. **CRIMINAL LAW JURISDICTION—JUSTICES' COURTS—LEGISLATIVE POWER.**—The legislature has no power, under the organic act, to authorize a justice of the peace to try a criminal case in which the fine or penalty exceeds, or may exceed, one hundred dollars. *People v. Maxon*, 330.
2. **UNITED STATES DISTRICT ATTORNEY.**—The United States district attorney has no right, power, or authority, except that conferred upon him by law prescribing his duties. The designation of "attorney for said territory," as used in our organic act, is synonymous with that of "the attorney of the United States," in the organic act of Washington territory. *People v. Heed*, 402.

PARDON.

LEGISLATIVE POWER.—An act of the legislative assembly of the territory remitting the penalty imposed in a criminal action, duly approved by the governor, is equivalent to a pardon. *People v. Stewart*, 546.

PARTIES.

1. **CONTRACT—PARTY PLAINTIFF.**—When a contract is made with a party in which another has a beneficial and resulting interest, the party with whom the contract was made has the right to recover though he allege the injury only to be to the stranger to the instrument or contract. *People v. Slocum*, 62.
2. **CAPACITY TO SUE.**—The people have the legal capacity to sue upon breaches of bonds given by defendants in criminal actions. *People v. Bugbee*, 88.
3. **AMENDING BY ADDING.**—The district court has the right at any time to call in other parties, or to cause the proceedings to be amended in that particular by striking out or adding the names of any parties, which may be necessary to accomplish the ends of justice and secure the interests of all. *Oro Fino M. Co. v. Cullen*, 113.
4. **JOINT CONTRACT.**—All parties jointly liable on a contract must be made defendants in an action on the contract. *People v. Sloper*, 158.
5. **WRIT OF ERROR.**—A writ of error may be sued out, under the statute, by one or more of several defendants, without joining their co-defendants in the writ. *Alexander v. Leland*, 425.
6. In an action to settle rights under the town-site act, the mayor of the city is not a necessary party. *Forsythe v. Richardson*, 459.
7. **EQUITY—MULTIPLICITY OF SUITS.**—The doctrine of the interposition of a court of equity to prevent a multiplicity of suits can not be maintained

- where there is simply a multitude of individuals, plaintiffs, whose several interests are not dependent upon one another. *Wilkerson v. Wallers*, 564.
8. **COLLATERAL ATTACKS—ADMINISTRATOR.**—Where an administrator of a deceased person's estate brings an action upon a promissory note due the estate, the authority of such administrator can not be attacked by the defendant, on the grounds that his appointment was irregularly made. Having no interest in the estate, it is a matter of no importance to the defendants, if they would be protected from a second payment of the same sum. *Gledennig v. McNutt*, 592.
 9. **COUNTY.**—A county can not be made a party in an appeal from an order of the board of commissioners. It can only be proceeded against by an action under the provisions of the statute which authorizes suits against a county. *Gorman v. County Commissioners*, 627.
 10. **ASSIGNEE.**—The assignee of a chose in action is in all cases the proper party to sue. *Brumback v. Oldham*, 709.
 11. **ASSIGNEE.**—The assignee of an account may bring an action upon it, in his own name, though the assignor retain an interest in it. *Id.*
 12. **"ADVERSE PARTY" DEFINED.**—The term "adverse party" in section 201 of our civil practice act has the same signification as to matters deemed excepted to as the term "aggrieved party," in section 436 of the same act. *Fox v. West*, 782.

PERSONAL PROPERTY.

1. **STATUTE OF FRAUDS—CHANGE OF POSSESSION.**—The statute of frauds does not require personal property to be removed from the place where situated when sold. It does not in any sense refer to the place, but to the actual and continued change of possession. *Hazard v. Cole*, 276.
2. **CLAIM AND DELIVERY.**—To support an action of claim and delivery, the property must be a personal chattel at the time of the taking, and not something which has been turned into a chattel by reason of having been separated from the freehold by the defendant. *Hull v. Hull*, 361.

PLACE OF TRIAL.

1. **CHANGING—PRACTICE.**—The question of changing the place of trial in order that the defendant may have an impartial trial, involves an issuable fact, and when an application is made for that purpose upon affidavits, it is proper to admit counter-affidavits to enable the court to judge of the necessity for such change. *Hyde v. Harkness*, 601.
2. **IDEM—BURDEN OF PROOF.**—The burden of showing that an impartial trial can not be had is on the party making the application, and even if there is a slight preponderance of evidence in favor of the application, this court will not reverse the action of the court below for that reason. *Id.*
3. **IDEM—DISCRETION.**—Granting a change of venue is a matter in the sound discretion of the court, and will not be reviewed except in cases of abuse. *Id.*
4. The convenience of witnesses residing in a neighboring state will not entitle a party to a change of the place of trial. *Shirley v. Nodine*, 696.
5. **IDEM—PRACTICE.**—An affidavit stating that a party believes the convenience of witnesses will be promoted by a change of the place of trial, is not sufficient without showing upon what grounds such belief is founded. *Id.*

6. **IDEM.**—The mere statement, in an affidavit, of a belief that the witness residing in an adjoining state will voluntarily attend, is not sufficient to entitle a party to a change of the place of trial. *Id.*
7. **CHANGING VENUE.**—After two jury trials without a verdict, a motion to change the place of trial should not be granted, unless it be clearly established that a fair and impartial trial could not be had in the county of defendant's residence. *Sommercamp v. Catlow*, 716.
8. Congress having, by law, given the district courts of the territory jurisdiction of offenses against the laws of the United States, and having given the justices of the supreme court power to fix the times and places of holding district courts; by so fixing them they have also fixed the place of trial of offenses against the laws of the United States. Congress, therefore, having, by means of the power thus delegated, fixed the place of trial, has disposed of all questions of jurisdiction of the court, as well as all objections to the jury as not being drawn from the vicinage. *U. S. v. Mays*, 763.

PLEADING.

1. **CAUSES OF ACTION—JOINDER.**—The rule under the code allows a party to state as many causes of action as he may have, if they are of a character to be properly combined in the same complaint, but it does not permit a party to set out the same causes under different forms. *People v. Slocum*, 62.
 2. **VARIANCE—PROOFS.**—It is considered no variance from the proof if the facts show a substantial right to recover under the allegations, and the necessity of having various forms of stating the same cause of action is thus fully obviated. *Id.*
- See JUDGMENT, 6.
3. **CHANCERY.**—The old rules of chancery pleading are abolished by the code. *Wa Ching v. Constantine*, 266.
 4. **IDEM—EQUITABLE DEFENSE.**—Under the provisions of section 49 of the code, an equitable defense may be pleaded to a legal cause of action. *Id.*
 5. **COMPLAINT—RECOGNIZANCE.**—An allegation in a complaint, that "a recognizance was made and duly delivered" must be held to mean that it was returned to the clerk of the court, as required by law; and such allegation is sufficient. *People v. Myers*, 356.
 6. **COMPLAINT—PLEADING.**—If the property claimed be so mixed with other property that a delivery of the specific article can not be made, and the plaintiff fails to ask judgment for its value in case it can not be delivered, the action of claim and delivery can not be maintained. *Hull v. Hull*, 361.
 7. **AMENDED.**—When an amended complaint is filed, it takes the place of the original, and all subsequent proceedings in the case are based upon the amended pleading. *People v. Hunt*, 433.
 8. **VERIFICATION.**—When the complaint is not verified, the answer need not be verified. *Id.*
 9. **ESTOPPEL—INSTRUCTIONS.**—A party to an action can not avail himself of the benefits of an estoppel, unless he plead it. It is error for the court to submit such question to the jury by instruction, unless it be pleaded. *Leland v. Isenback*, 469.
 10. **DEMURRER—COMPLAINT.**—The objection that a complaint does not state

- facts sufficient to constitute a cause of action, is never waived. *Great-house v. Heed*, 482.
11. ANSWER—DEMURRER.—When a defendant in an action demurs within ten days after service of summons upon him, he has answered within meaning of the statute; and no judgment for want of an answer can be rendered against him. *Leggett v. Meyers*, 548.
 12. VERIFICATION—ANSWER—DENIALS.—When the complaint is verified, the answer must deny, specifically, every material allegation of the complaint, but need not traverse mere matters of surplusage. *Pence v. Durbin*, 550.
 13. ANSWER—DENIALS.—A denial of the literal truth of the allegations of a complaint, and not a denial of every specific averment in it, is evasive. A failure to deny, specifically, each and every material allegation of a verified complaint, admits the allegations not so denied. *Norris v. Glenn*, 590.
 14. AGREEMENT—PRESUMPTIONS.—Unless an agreement appears from the complaint to have been verbal, the court will presume that it was in writing, where the nature of the agreement is such that it could not be valid unless in writing. *Bowman v. Ainalie*, 644.
 15. LACHES—DEFECTIVE COMPLAINT.—No laches is imputable to a defendant for not interposing objections to the complaint at the first opportunity, when it appears that the plaintiff is not entitled to recover. *Gorman v. County Commissioners*, 655.
 16. ON SUPERSEDEAS BONDS.—In an action upon a *supersedeas* bond in a case wherein the proceedings have been staid by the bond, it is not necessary to allege or prove that the action in which the bond was given, was an appealable one. *Ray v. Ray*, 705.
 17. ASSIGNMENT—CONSIDERATION.—The consideration of an assignment need not be alleged or proved. *Brumback v. Oltham*, 709.
 18. CHAMPERTY.—Unless champerty be alleged in the pleadings, it can not be considered. *Id.*
 19. CLAIM AND DELIVERY—NEW MATTER.—When, in an action in claim and delivery for the recovery of personal property, the complaint alleges ownership and a right to the possession, the answer denying these allegations, it is not error in the court to allow the defendant to prove his right to the possession by virtue of a lien to defeat a recovery by plaintiff. The establishment of such right by defendant is not new matter required to be affirmatively pleaded. *Lindsay v. Wyatt*, 738.
 20. DENIALS UPON INFORMATION AND BELIEF.—A denial in an answer of the material averments of the complaint, upon information and belief, is sufficient to raise an issue to be tried, if the facts are not within the personal knowledge of the answering defendant. *People v. Curtis*, 753.
 21. PRACTICE.—Under the code of procedure a defendant is not only permitted, but is required to set up all matters of defense, by answer in the original action, whether such matters are legal or equitable in their character. *Utah & N. R. Co. v. Crawford*, 770.

POSSESSION.

1. POSSESSORY RIGHTS—EVIDENCE OF TITLE.—It is a well-settled rule in relation to possessory rights that prior possession is *prima facie* evidence of title. *Feirbaugh v. Masterson*, 135.

2. PRIOR.—To entitle a party to hold by right of prior possession, there must be an actual, *bona fide* occupation, a *possessio pedis*, a subjection to the will and control. *Id.*
3. It is not necessary that the occupant should cultivate the property claimed. It is sufficient if it be subjected to his use in the manner pointed out. Neither is any particular kind of inclosure required where a party is in possession of the land marked by distinct monuments of boundary, whether the same be a natural or an artificial inclosure. Claiming a title to the whole tract, the possession of the part so occupied will draw after it the possession of the whole. *Id.*
4. PUBLIC LANDS—ACTUAL.—In relation to public lands which are not mineral lands, the title, as between citizens of the territory, where neither connects himself with the government, is considered as vested in the first possessor, and to proceed from him. This possession must be actual, and not constructive. *Id.*
5. PRIOR—ACTUAL.—Where reliance is placed upon the prior possession of the plaintiff, or of parties through whom he claims, such possession must be shown to have been actual in him or them. By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. *Id.*
6. Having gone into the actual possession of a portion of the premises, they were entitled to a reasonable length of time in which to inclose them. What this length of time should be must, for the most part, depend upon the particular circumstances and locality of each claim. *Id.*
7. OF PART.—If a party were to locate and claim for agricultural purposes a tract of land, and were to reside upon, inclose, and cultivate a portion of the same, having artificial monuments sufficient to indicate generally the boundaries of the entire claim, this would most certainly be a substantial compliance with the rule, and such possession of a part would draw after it the possession of the whole. *Id.*
8. PUBLIC LANDS.—If the public lands of the United States are claimed by virtue of possession alone, the claimant is bound to take such precautionary steps as will advise all the world of his rights. *Forsythe v. Richardson*, 459.
9. DAMAGES—OF LAND.—The lawful possession of land is all that is required to enable a plaintiff to recover damages for building a dam across a watercourse running through such land, by reason whereof the water is thrown back upon the land of plaintiff. *Norris v. Glenn*, 590.
10. An occupancy of one legal subdivision does not draw to it another legal subdivision, though contiguous to or immediately adjoining it. *Thompson v. Holbrook*, 609.

POSSESSORY RIGHTS.

1. PRIOR POSSESSION—EVIDENCE OF TITLE.—It is a well-settled rule in relation to possessory rights that prior possession is *prima facie* evidence of title. *Fairbaugh v. Masterson*, 135.
2. IT IS NOT NECESSARY THAT THE OCCUPANT SHOULD CULTIVATE the property claimed. It is sufficient if it be subjected to his use in the manner pointed out. Neither is any particular kind of inclosure required where

a party is in possession of the land marked by distinct monuments of boundary, whether the same be a natural or an artificial inclosure. Claiming a title to the whole tract, the possession of the part so occupied will draw after it the possession of the whole. *Id.*

PRACTICE.

1. **CLERK'S CERTIFICATE.**—The certificate of the clerk of the district court that the "judgment has been duly appealed" will not cure any defects in the record. It is for the court to determine that question from the record. *Moore v. Koubly*, 55.
2. **APPEARANCE—WAIVER.**—A party appearing generally, in a suit or proceeding, thereby cures whatever defects may exist in the original process to bring him into court. *Id.*
3. **A VOLUNTARY APPEARANCE** in an action is as effectual for any purpose as due service of process. *Id.*
4. **CAUSES OF ACTION—PLEADING—JOINDER.**—The rule under the code allows a party to state as many causes of action as he may have, if they are of a character to be properly combined in the same complaint, but it does not permit a party to set out the same causes under different forms. *People v. Slocum*, 62.
5. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—If the newly discovered evidence brings to light some new fact bearing upon the main question at issue, and would be likely to change the result, a new trial should be granted. *Flannagan v. Newberg*, 78.
6. **CAPACITY TO SUE.**—The people have the legal capacity to sue upon breaches of bonds given by defendants in criminal actions. *People v. Bugbee*, 88.
7. **JUDGMENT.**—It is error to enter judgment against one of the defendants, after having sustained a demurrer to the complaint upon the ground that such pleading "does not state facts sufficient to constitute a cause of action," without first amending the same. *Lowe v. Turner*, 107.
8. **FOR THE SAKE OF HARMONIZING THE PRACTICE** in legal and equitable cases, and to give effect to the spirit of our code, we incline to the opinion that the practice is, to proceed against a decree in order to annul or set it aside in the same manner as against a judgment entered in a court of law. *Oro Fino M. Co. v. Cullen*, 113.
9. **DISSOLVING INJUNCTION.**—A party denying the allegations of a bill in equity, and desiring to procure the dissolution of an injunction on the ground of having denied the equities of such bill, must controvert directly every material allegation of such bill; he must not undertake to set up new facts, must not confess and avoid. It must simply be a plain, direct, unequivocal denial. *Id.*
10. **WHEN THE WHOLE EQUITY OF THE COMPLAINT IS DENIED** by the answer, the defendant is entitled to a dissolution of the injunction *pendente lite* until the plaintiff's title is established by proper evidence on the hearing of the cause. But to have this effect the denial of such equities must be full and specific, and must cover the whole ground. *Id.*
11. **IF FACTS ARE ADMITTED WHICH QUALIFY** a general denial; if the denials be evasively made; or if, on examination of the circumstances, the court deem that the facts warrant the continuance of the injunction notwith-

- standing a formal denial may have been made, the rule will not be applied. *Id.*
12. **EXCEPTIONS.**—It is undoubtedly the general rule that when a party seeks to reverse a judgment rendered in the inferior court, he must except to the ruling of the court and assign the error in this court on appeal. *Lamkin v. Sterling*, 120.
13. **THE EXCEPTIONS TO THE RULE** that exceptions must be first taken in the court below are where a complaint is so radically defective that it discloses no cause of action and will not support a judgment; and where a judgment has been taken by default and the appellant could not except by reason of his non-appearance, and who was bound to see that the proceedings were regular and legal. *Id.*
14. **THERE IS NO RULE OF PRACTICE GOVERNING LEGAL PROCEEDINGS** more clearly defined, nor better settled, than that any objections of whatever character, whether with reference to the regularity of the proceedings on the trial of the cause, or to error of law committed by the judge in relation to a motion, or of any ruling whatever on a question of law arising during the proceedings, must be taken at once, at the time when the question arises. *Id.*
15. **EQUITABLE JURISDICTION—LEGAL JURISDICTION.**—Legal and equitable relief may be sought in the same action, and by the same complaint, but the grounds therefor must be distinctly and separately stated. *Wa Ching v. Constantine*, 266.
16. **APPEAL.**—Upon an appeal from a judgment, without a statement or bill of exceptions, nothing can be considered but the judgment roll. *Gamble v. Dunwell*, 268.
17. **APPEALS—WRITS OF ERROR—BILLS OF EXCEPTION.**—The legislative assembly has authority to regulate the mode of taking and allowing writs of error, bills of exception, and appeals; and such regulations, when made, apply to all cases, whether arising under the laws of the United States, or of the territory. *U. S. v. Gilson*, 364.
18. **APPEAL—NOTICE OF APPEAL—UNDERTAKING ON APPEAL.**—Three things are necessary in order to perfect an appeal, and to give the supreme court jurisdiction. 1. A notice of appeal must be filed as required by law. 2. A copy of the notice must be served on the adverse party or his attorney. 3. An undertaking must be filed within five days after filing notice of the appeal. *Shissler v. Crooks*, 369.
19. **A FAILURE BY PLAINTIFF TO DENY**, by affidavit, the genuineness and due execution of an instrument in writing set forth in the answer as the foundation of the defense, does not preclude the plaintiff from showing, on the trial, that it was procured by fraud or misrepresentation. *Cox v. N. W. Stage Co.*, 376.
20. **CERTIORARI.**—Three things are necessary to be shown to warrant the granting of a writ of certiorari to the district judge: 1. That the judge exceeded his jurisdiction. 2. That there is no appeal. 3. That there is no other plain, speedy, and adequate remedy. *People v. Lindsay*, 394.
21. **DISMISSING WRIT.**—A writ of certiorari improperly granted, will be dismissed on motion. *Id.*
22. **CERTIORARI.**—Certiorari will not lie until the case has been finally disposed of in the inferior court. *Id.*
23. **EVIDENCE—ERROR.**—It is not error for the court below to admit im-

proper evidence, such as a sheriff's deed, without first showing a valid judgment, unless objection be made to its introduction. *Leland v. Isenbeck*, 469.

24. REFEREE.—The only order under which a referee can act, is the one duly made and entered of record before he enters upon his duties; to that he must look for his authority, and he can not go beyond it. *Taylor v. Peterson*, 513.
25. AMENDMENTS.—An order appointing a referee may not be amended against objections, after such referee has acted, so as to make valid acts not authorized by the original order appointing him and prescribing his duties. *Id.*

See NEW TRIAL, 5, 6.

26. BILLS OF REVIEW.—After a defendant has demurred to a bill of review, he can not raise an objection to the right of the plaintiff to file it. To avail himself of such objection, he should move the court, on his first appearance, to strike the bill from the files, or to dismiss the suit. *Hyde v. Lamberson*, 539.
27. ANSWER—DEMURRER—PLEADING.—When a defendant in an action demurs within ten days after service of summons upon him, he has answered within meaning of the statute; and no judgment for want of an answer can be rendered against him. *Leggett v. Meyers*, 548.
28. CAUSES OF ACTION.—Those causes of action growing directly out of the breach of an undertaking can be the subject of but one action. *Pence v. Durbin*, 550.
29. ANSWER—WAIVER.—An answer by a party, after the overruling of his demurrer, waives all defects in the complaint, except those which may properly be taken advantage of on a motion in arrest of judgment. *Id.*
30. DEFECTIVE VERIFICATION—MOTION TO STRIKE OUT.—An answer can not be disregarded because of a defective verification. A judgment rendered on the pleadings upon the grounds of such defect, is erroneous. The only proper mode of reaching such a defect is by a motion to strike out. *Id.*
31. VERIFICATION.—A verification of a pleading made by a person not a party to the action is sufficient if it shows any statutory reason why it is not made by a party to the action. *Id.*
32. DUE DILIGENCE.—Where a witness is beyond the reach of the process of the court, a party desiring his testimony must sue out a commission to take his deposition, and a failure to do so shows a want of due diligence and a neglect to use the proper means to obtain the evidence. *Alvord v. U. S.*, 585.
33. PRODUCTION OF DOCUMENTS—NOTICE.—When documentary evidence which a party needs in the trial of a cause, is in the hands or under the control of the opposite party, before the latter can be required to produce it on the trial, he must have due notice thereof. When he has it in his possession, in court at the trial, notice at the time is sufficient; otherwise, to be effectual, it must be served upon him a sufficient length of time before the trial to enable him to produce it. *Id.*
34. JUDGMENT ON THE PLEADINGS.—If the allegations of a complaint are not denied by the defendant, the plaintiff is entitled to a judgment on the pleadings, without any proof on his part. *Id.*
35. APPEAL—NOTICE.—An appeal to the supreme court can not be taken ex-

- cept by filing the notice thereof with the clerk, and serving a copy thereof upon the adverse party or his attorney. *Slocum v. Slocum*, 589.
36. SERVICE OF NOTICE OF APPEAL.—The service of the copy of a notice of appeal must be contemporaneous with, or after the filing of the notice; hence, the service upon the adverse party before the filing of the notice is not a sufficient service. *Id.*
37. ERRORS WHICH DO NOT PREJUDICE.—Where the district court refused to admit evidence which, if admitted, would have been against the party seeking to introduce it, such party can not avail himself of such refusal as error, even though such evidence should have been admitted. *Glen-denning v. McNutt*, 592.
38. PLACE OF TRIAL—CHANGING.—The question of changing the place of trial in order that the defendant may have an impartial trial, involves an issuable fact, and when an application is made for that purpose upon affidavits, it is proper to admit counter-affidavits to enable the court to judge of the necessity for such change. *Hyde v. Harkness*, 601.
39. IDEM—BURDEN OF PROOF.—The burden of showing that an impartial trial can not be had is on the party making the application, and even if there is a slight preponderance of evidence in favor of the application, this court will not reverse the action of the court below for that reason. *Id.*
40. MOTION FOR NEW TRIAL.—Three steps are necessary in moving for a new trial: 1. Giving notice of intention to make the motion. 2. Filing the statement or affidavits upon which the motion is to be made. 3. The application or motion. *Sterens v. N. W. Stage Co.*, 604.
41. NEW TRIAL—STATEMENT.—The statement on a motion for a new trial must be settled, before a decision on the motion, in order that the court below or judge thereof may have something definite and certain to act upon. The practice of deciding the motion and afterwards settling the statement, condemned. *Id.*
42. APPEAL—STATEMENT—BILL OF EXCEPTIONS.—Where there is no statement of the case or bill of exceptions, and the pleadings warrant the verdict and judgment, this court can not disturb the judgment; but must affirm the same. *Hyde v. Harkness*, 638.
43. REVIEWING VERDICT ON APPEAL FROM JUDGMENT.—Upon an appeal from a judgment the court may review the verdict of the jury, if excepted to, and the evidence upon which such verdict is based. An exception to the verdict, on the ground that it is not supported by the evidence, can not be reviewed on an appeal from the judgment, however, unless the appeal is taken within sixty days after the rendition of the judgment. *Ainslie v. Idaho World Printing Co.*, 641.
44. COMPLAINT—OBJECTIONS TO.—Where a party shows no right to recover, objections to the complaint or other pleading may be taken for the first time in the appellate court; and where a party shows no right to recover under any possible state of proof, the court is not bound to submit the case to a jury. *Gorman v. County Commissioners*, 655.
45. APPELLATE COURT—REMANDING CASE.—When the appellate court is in possession of all the rights of the parties, and can render full and complete justice, it will not remand the case for further litigation. *Id.*
46. MOTION FOR NEW TRIAL.—On a motion for a new trial, on the ground that the court denied a continuance, the moving party should procure the

affidavits of the absent witnesses showing that they can testify to the facts sought to be proven; or show sufficient reason for not obtaining such affidavits. *Lillienthal v. Anderson*, 673.

47. **IDEM—SURPRISE—EVIDENCE OF.**—On a motion for a new trial, on the ground that the party was taken by surprise by reason of one of his own witnesses failing to testify to a material fact which the witness had previously stated in the presence of others he could testify to, the affidavits of the persons in whose hearing such statements were made, are the best evidence of the surprise, and should be produced. *Id.*
48. **EVIDENCE.**—Evidence which is capable of affording an inference of a fact, or which constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it, should be admitted. It is error to reject such evidence. *Id.*
49. **IDEM.**—An affidavit stating that a party believes the convenience of witnesses will be promoted by a change of the place of trial, is not sufficient without showing upon what grounds such belief is founded. *Shirley v. Nodine*, 696.
50. **IDEM.**—The mere statement, in an affidavit, of a belief that the witnesses residing in an adjoining state will voluntarily attend, is not sufficient to entitle a party to a change of the place of trial. *Id.*
51. **PLACE OF TRIAL—CHANGING VENUE.**—After two jury trials without a verdict, a motion to change the place of trial should not be granted, unless it be clearly established that a fair and impartial trial could not be had in the county of defendant's residence. *Sommercamp v. Catlow*, 716.
52. **TERRITORIAL DISTRICT COURTS—PRACTICE IN.**—The territorial district courts are not district courts of the United States. The legislature may prescribe the practice in the district courts of the territory, in cases arising under the constitution and laws of the United States, as well as in those arising under the laws of the territory. In this territory, however, the legislature has not done so; and the courts are at liberty to make orders and adopt regulations concerning the practice in United States cases, for themselves. *U. S. v. Mays*, 763.
53. **EXCEPTIONS.**—The exceptions which, by section 201 of the civil practice act, the adverse party is deemed to have taken, have the same force and effect in the conduct of the action as other exceptions taken during the trial, and can not be considered on appeal without being incorporated into a bill of exceptions, and thus made a part of the record. *Fox v. West*, 782.
54. **RELIEF OBTAINABLE IN COURT BELOW.**—Any relief sought which is attainable in the court below can not be granted in the first instance, in the appellate court. *Id.*

PRESUMPTION.

1. **RECEIPTING FOR GOODS "IN GOOD ORDER" NOT CONCLUSIVE.**—The fact that plaintiff received goods without objection, and receipted for the same as in good order, raises a strong presumption in favor of defendant, but does not amount to an absolute defense to an action to recover for damage to goods while in the hands of the defendants as common carriers. *Bloomingtondale v. Du Rell*, 33.
2. **EVIDENCE.**—The knowingly and secretly keeping instruments adapted and intended for the unlawful business of counterfeiting, is made proof of

- the guilty aim to use them for the evil purpose for which they were evidently designed. It is a presumption that the prisoner is called upon to rebut. *People v. Page*, 102.
3. **COURTS OF RECORD.**—All presumptions and intendments are in favor of the regularity of the proceedings of courts of record. *Lowe v. Turner*, 107.
 4. An appellate court will not presume error in the court below, and thus throw the *onus* on the respondent of establishing its correctness. "All intendments must be in favor of sustaining the judgments of courts of original jurisdiction, and to disturb such judgment it is not sufficient that error may have intervened, but it must be affirmatively shown by the record." *Goodman v. Minear M. & M. Co.*, 131.
 5. **SHERIFF.**—Every intendment of law is in favor of the regularity of the proceedings of a sheriff under an attachment or execution, and nothing but willful disregard of the rights of others will subject him to liability. *Roth v. Duvall*, 149.
 6. **CRIMINAL LAW.**—The general rule in criminal cases is that every person is supposed to contemplate the result, and know the nature of his acts, so that when the acts which constitute the crime are established, the guilt is presumed. Guilty purpose is presumed from the commission of an unlawful or forbidden act. *People v. Page*, 189.
 7. **FINDINGS—PRACTICE.**—When no testimony is reported in a statement, from which this court can determine as to the propriety or impropriety of the findings of the court below, the presumption is that the testimony was, in every respect, sufficient to support the findings. *Hazard v. Cole*, 276.
 8. **WAIVER—ACQUIESCENCE.**—What has been done and long acquiesced in until the rights of third parties have grown up thereunder, should be presumed to have been rightly done. *Id.*
 9. **JUDGMENT.**—On motion for new trial, or on appeal, every intendment is in favor of the judgment or ruling of a court of record. The party complaining must show error affirmatively. *Id.*
 10. **JURY.**—A jury is presumed to have found its verdict upon the facts without having been influenced by passion or prejudice, and where a verdict is for a less sum than the full amount demanded in the prayer of the complaint, this presumption is strengthened. That a jury has been influenced by passion or prejudice must be made to appear affirmatively. *Cox v. N. W. Stage Co.*, 376.
 11. **OFFICER.**—Every officer is presumed to do his duty. *People v. Owyhee Lumber Co.*, 420.
 12. **RECORD OF MINING CLAIM—NOTICE OF LOCATION OF MINING CLAIM.**—If one of several co-locators of a mining claim cause a notice of location of a mining claim to be recorded in the name of himself and his co-locators, in the absence of proof to the contrary it will be presumed that the written consent of such co-locators had been seen, and a minute made thereof by the recorder, before recording such notice. *Kramer v. Settle*, 485.
 13. **THIS COURT CAN NOT PRESUME** that anything was omitted to be done, by the court below, that the law requires to be done, to insure a fair trial; but must presume, in the absence of any showing to the contrary by the

defendant, that everything necessary to be done was done. *People v. Waters*, 560.

14. IN CASE THE PARTIES can not agree upon the statement, notice must be given for a settlement before the court or judge, by the party proposing the statement, but it must affirmatively appear that no notice was given, or this court will presume that it was given. *Stevens v. N. W. Stage Co.*, 604.
15. CONSTRUCTION.—This court can not place a construction upon an order of the court below not warranted by its language, or indulge in presumptions or surmises not warranted by the fair import of the words used. *Id.*
16. APPEAL—REGULARITY OF PROCEEDINGS MUST APPEAR.—The regularity of the proceedings by which an appeal is taken must be shown affirmatively. Nothing will be presumed in favor of the same. *Anderson v. Knott*, 626.
17. PLEADING—AGREEMENT.—Unless an agreement appears from the complaint to have been verbal, the court will presume that it was in writing, where the nature of the agreement is such that it could not be valid unless in writing. *Bowman v. Ainslie*, 644.
18. CRIMINAL CASES.—The presumptions are in favor of the regularity of the proceedings in the district court, in criminal as well as in civil cases. *People v. Ah Hop*, 698.
19. FINDINGS.—In the absence of findings of fact from the record in a cause tried by the court without a jury, the presumption is that they were waived. If not, that fact should appear affirmatively. *Squier v. Lowenberg*, 785.

PROBATE COURT.

1. JURISDICTION OF.—The probate courts of this territory have not jurisdiction of cases for the punishment of offenders under the license laws. *People v. Du Rell*, 44.
2. JURISDICTION.—The act of the legislature conferring appellate jurisdiction upon the probate courts in civil cases, is in conflict with the organic act. *Moore v. Koubly*, 55.
See JURISDICTION, 11, 12.
3. PLEADING—DEMURRER.—A demurrer is a proper pleading in the probate court. *Leggett v. Meyers*, 548.
4. JURISDICTION.—When the existence of jurisdiction of inferior courts, of which the probate court is one, is proved or conceded, the maxim *omnia rite acta* applies to them as well as to courts of general jurisdiction, and every intendment must be in support of the proceedings. *Glendenning v. McNutt*, 592.
5. JURISDICTION.—Jurisdiction of the subject-matter is one thing and the exercise of it another. An irregular or erroneous exercise of its jurisdiction, by a probate court, will not render its proceedings void, but voidable only. *Id.*
6. JUDICIAL ACTS—MINISTERIAL ACTS—NON-JUDICIAL DAY.—The act of appointing an administrator of an estate by a probate court is a judicial act, while that of issuing letters of administration is merely ministerial; therefore, the statute only forbidding the transaction of judicial business on Christmas day, letters issued on that day are not void. *Id.*
7. JURISDICTION.—Probate courts are courts of special and limited statutory jurisdiction. *Ethell v. Nichols*, 741.

8. **SALE OF REAL ESTATE BY.**—An order for the sale of real estate, under the provisions of the probate act, is a judgment in a new, separate, and independent proceeding, depending for its validity upon the sufficiency of the facts alleged in the petition for the order. *Id.*
9. **IDEM—JURISDICTION.**—It is necessary to the jurisdiction of the probate court making the order of sale of real estate, that there should be a petition therefor, sufficient, in substance, to show legal grounds for the order; and it is necessary to prove that there was such a petition when the jurisdiction of the probate court to make the order of sale is controverted. *Id.*

PROCESS.

1. **SHERIFF—SERVICE OF.**—It is well settled that a sheriff can not refuse to serve process regularly issued to him, because in his opinion it is defective or irregular. *Roth v. Duvall*, 149.
2. **DEFINED.**—The word process, as used in the statute, is equivalent in meaning to the sheriff's official authority. *People v. Nash*, 206.

See SUMMONS.

PROMISSORY NOTES.

1. **INDORSER—NOTICE.**—The undertaking of an indorser is conditional; that is, his promise is that he will pay provided payment shall be demanded of the maker and due notice of his neglect or refusal shall be given. *Ankeny v. Henry*, 229.
2. **INDORSEE—CONTRACT WITH INDORSERS.**—The person receiving a note by indorsement contracts with the indorser whom he expects to hold, that he will present it to the maker at maturity, for payment, and if not paid that he will give notice of non-payment without delay. *Id.*

QUO WARRANTO.

1. **INTERVENTION.**—The right of intervention given by statute exists only in actions which are purely civil in their character. The statutory proceeding in the nature of a *quo warranto* is *quasi* criminal in character, and in such action the right to intervene does not exist. *People v. Green*, 235.
2. **DISTRICT COURT—JUDGE AT CHAMBERS—JURISDICTION.**—The district court has jurisdiction on *quo warranto* to determine the rights of several parties who claim to be entitled to the office of sheriff; and the judge of that court may properly decide, in such case, whether it is necessary to allege in the complaint that there has been an actual usurpation of the office; and if there be error in the ruling, such error may be corrected on appeal. *People v. Lindsay*, 394.
3. **DISTRICT COURT—JURISDICTION.**—An action for the usurpation of an office, in the nature of *quo warranto*, brought in the name of the people, on the territorial side of the district court, for the removal of a county officer, is properly brought. *People v. Curtis*, 753.

RECEIPT.

- RECEIPTING FOR GOODS "IN GOOD ORDER" NOT CONCLUSIVE.**—The fact that plaintiff received goods without objection, and receipted for the same as in good order, raises a strong presumption in favor of defendant,

but does not amount to an absolute defense to an action to recover for damage to goods while in the hands of the defendants as common carriers. *Bloomington v. Du Rell*, 33.

RECORD.

1. **MATTERS OF.**—In respect to matters of record in which two parties are interested, they are within the knowledge of both, and neither party has a right to rely upon the recollection of the other. *Hazard v. Cole*, 276.
2. **APPELLATE COURT—STATEMENT—BILL OF EXCEPTIONS.**—This court can not consider alleged errors not apparent in the record, nor brought into it by a statement or bill of exceptions, properly settled and signed by the judge of the district court, or agreed to by the parties. *People v. Hunt*, 433.
3. **MINING CLAIMS—EVIDENCE.**—The statute which provides that copies of papers duly filed in the recorder's office, certified by the recorder, shall be received with like effect, in courts, as the original instruments, etc., gives the same effect to such copies as courts would give to the originals when produced, and their execution proved. *Kramer v. Settle*, 485.
4. **IN CRIMINAL CASE—EXCEPTIONS.**—Any matter not otherwise forming a part of the record, must be made so, by a bill of exceptions. *People v. Waters*, 560.
5. **IDEM.**—All the formalities required by the statute to be observed in a criminal case, are not required to be made a part of the record. *Id.*
6. **MATTERS NOT A PART OF.**—The statute does not require that the fact of the arraignment, or that the jury was admonished at each adjournment of the court, or that the officer in charge of the jury was sworn, should be made a part of the record of the action. *Id.*
7. **INSTRUCTION—EXCEPTIONS.**—An instruction, not excepted to, in a civil case, is not properly a part of the record, and can not be reviewed upon an appeal. *Emery v. Langley*, 694.
8. **CRIMINAL LAW—ARRAIGNMENT.**—It is not necessary for the record on appeal to show an arraignment. The fact of an arraignment is not necessarily a part of the record. *People v. Ah Hop*, 698.
9. **ON APPEAL.**—On appeal from a judgment, without a statement or bill of exceptions, nothing belongs to the record except the judgment roll, and no question outside of the record can be considered by this court. *Ray v. Ray*, 705.
10. **ON APPEAL.**—The record on an appeal to this court ought not to be incumbered with useless repetitions. *Dangel v. Levy*, 722.
See **APPEAL**, 59.
11. **DISMISSING APPEAL.**—If the record shows no notice of appeal, and it does not, in some way, affirmatively appear that a proper notice has been filed in the office of the clerk of the court below, the appeal will be dismissed. *Caldwell v. Ruddy*, 760.
12. **PRACTICE—NON-APPEALABLE ORDERS—BILL OF EXCEPTIONS.**—Interlocutory non-appealable orders in an action can not be reviewed on appeal without being incorporated into a bill of exceptions, and brought up with the judgment roll, and thus made a part of the record. *Graham v. Linehan*, 780.
13. **JUDGMENT ROLL—WHAT CONSTITUTES.**—The papers constituting the

judgment roll are specified in section 221 of the civil practice act. Papers not enumerated therein can not properly be inserted in the transcript, and if placed there, can constitute no part of the record. *Id.*

14. REVIEW ON JUDGMENT ROLL.—On appeal from a final judgment, if the record contains no bill of exceptions or statement, the case must be reviewed and decided upon the judgment roll alone. *Id.*

REFEREE.

1. THE ONLY ORDER UNDER WHICH A REFEREE CAN ACT, is the one duly made and entered of record before he enters upon his duties; to that he must look for his authority, and he can not go beyond it. *Taylor v. Peterson*, 513.
2. AMENDMENTS.—An order appointing a referee may not be amended against objections, after such referee has acted, so as to make valid acts not authorized by the original order appointing him and prescribing his duties. *Id.*
3. EXCEPTIONS.—If a party take no exception to an order of court confirming the report of a referee, he is not in a condition to urge objections to such order in this court. *Id.*

REPEAL OF STATUTES.

1. A GENERAL STATUTE without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. *People v. Lytle*, 143.
2. A STATUTE CLEARLY REPUGNANT to a prior one necessarily repeals the former, although it does not do so in terms. *Id.*
3. THOUGH A SUBSEQUENT STATUTE be not repugnant in all its provisions to the prior one, yet if the latter was clearly intended to provide the only rule that should govern in the case provided for, it repeals the original act. *Id.*

REQUISITION.

AGENT—OFFICER.—The position of an agent named in a requisition to receive and return a fugitive from justice, is an office; and such officer is entitled to the fees and emoluments fixed by law for his services. *Settle v. Sterling*, 259.

RES GESTÆ.

EVIDENCE.—In order to entitle declarations to be received in evidence as part of the *res gestæ*, they must be a part of an act, and such as may serve to explain or qualify it, and must have been made while such act was being performed. *Kramer v. Settle*, 485.

REVENUE.

1. TAX—DEBT.—A tax levied or authorized by the territorial legislature, is a debt within the meaning of the act of congress authorizing the issue of legal tender treasury notes. *Haas v. Misner*, 170.
2. STATUTE.—A territorial statute requiring the payment of taxes in any other than lawful money, at par, is void as being in conflict with the act of congress of February 25, 1862. *Id.*
3. TAXES—INJUNCTION.—The purpose of section 3 of the revenue act, making the taxes a lien on the property, and declaring that it shall not be re-

moved until the taxes are paid, is to secure the payment of the taxes. If the payment of a judgment for taxes is secured by an undertaking on appeal, an injunction ought not to be granted to prevent the removal of the property. *People v. Preston*, 374.

4. **IMPROVEMENTS—DEFINITION.**—By the term “improvements” on public lands, as used in the revenue law, is meant the buildings and improvements belonging to the possessory claimant, such as miners’ buildings, quartz-mills, sawmills, out-buildings, fences, etc. *People v. Owyhee M. Co.*, 409.

See TAXES AND TAXATION.

ROBBERY.

1. **INDICTMENT.**—In an indictment for robbery, the words “felonious” and “rob” carry with them the intent, and are sufficient. *People v. Butler*, 231.
2. **INSTRUCTIONS.**—An instruction to the jury “that if they believe from the evidence that the defendants feloniously took possession of the United States mail, or any part thereof, by force or intimidation of or from a carrier of the mail, then the offense of robbery is complete,” is simply a definition of the term robbery, as applied to the case. It is not erroneous. *U. S. v. Mays*, 763.
3. **DANGEROUS WEAPONS, USE OF.**—For a person to arm himself with dangerous weapons and carry them to the place of the robbery, with intent to kill, is the “use of dangerous weapons.” *Id.*

SCHOOLS.

SCHOOL TAX.—The tax collectors are not entitled to any compensation whatever for collecting school tax or revenue raised for the maintenance and support of public schools under the school law of this territory. *Gorman v. County Commissioners*, 647.

SHERIFF.

1. **SERVICE OF PROCESS.**—It is well settled that a sheriff can not refuse to serve process regularly issued to him because in his opinion it is defective or irregular. *Roth v. Duvall*, 149.
2. **EXEMPT PROPERTY—JUDICIAL DISCRETION.**—The question as to whether property is exempt from execution involves the exercise of judicial discretion, and its decision is not confided to the action of the attaching officer. *Id.*
3. **INDEMNIFICATION.**—When the sheriff has doubts as to the legality of a levy in the first instance, he may refuse to execute the writ unless indemnified; but if he does attach and returns his writ, he places all question as to its validity before the court. *Id.*
4. **PRESUMPTION.**—Every intendment of law is in favor of the regularity of the proceedings of a sheriff under an attachment or execution, and nothing but willful disregard of the rights of others will subject him to liability. *Id.*
5. **ATTACHED PROPERTY—APPLICATION FOR RELEASE.**—An application for the release of property held under attachment or execution returned into court, should be made to the court or judge, and not to the attaching officer. *Id.*

6. If a sheriff execute the writ on property, and does not affix such a value as will charge him with less than the plaintiff's claim, he is presumed to have satisfied himself that he had sufficient, and is chargeable on that basis. *Id.*
7. SHERIFF'S SALE—SHERIFF'S DEED.—In order to uphold a sheriff's deed, it must appear that a valid judgment was obtained against the party whose property is sought to be conveyed by it, and that the property was sold upon an execution issued upon such judgment. *Leland v. Isenbeck*, 469.

SPECIFIC CONTRACT ACT.

1. VOID STATUTES.—The territorial act approved December 4, 1864, commonly called the specific contract act, conflicts with the act of congress approved February 25, 1872, authorizing the issue of legal tender treasury notes, and is therefore void. *Betts v. Butler*, 185.
2. JUDGMENT FOR GOLD COIN.—A gold-coin judgment is not erroneous when the question is in issue whether an oral contract required payment in gold coin or currency. *Emery v. Langley*, 694.

SPECIFIC PERFORMANCE.

1. DISCRETION OF COURTS.—The specific performance of a contract is not a matter of right, strictly speaking, but a matter in the sound and reasonable discretion of the court. *Vincent v. Larson*, 241.
2. JUDGMENTS—GOLD COIN.—A judgment for gold coin is not in any event void because it is so rendered. It may be irregular, but is then subject to modification only, either in the same court on motion, or on appeal by this court. *Hazard v. Cole*, 276.
3. VENDOR'S LIEN—PRACTICE.—A decree for a specific performance in a suit brought to enforce a vendor's lien, can not be upheld. *Hawkins v. Thurman*, 598.

STATEMENT ON APPEAL.

See APPEAL, 11, 14, 25, 27, 28, 30, 33-35, 40, 44, 53, 59, 63.

STATUTORY CONSTRUCTION.

1. It is the duty of the courts to so construe statutes as to make them effect their evident purpose, and harmonize their various provisions with one another, and where the application of these rules still leaves a question of doubt, the principles of justice must determine the doubt. *Lamkin v. Sterling*, 92.
2. REPEAL.—A general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. *People v. Lytle*, 143.
3. A statute clearly repugnant to a prior one necessarily repeals the former, although it does not do so in terms. *Id.*
4. Though a subsequent statute be not repugnant in all its provisions to the prior one, yet if the latter was clearly intended to provide the only rule that should govern in the case provided for, it repeals the original act. *Id.*
5. VOID STATUTES—SPECIFIC CONTRACT ACT.—The territorial act approved December 4, 1864, commonly called the specific contract act, conflicts with the act of congress approved February 25, 1872, authorizing the issue of legal tender treasury notes, and is therefore void. *Betts v. Butler*, 185.

6. Different acts, passed by the legislature on the same day, upon the same subject-matter, will be read together as parts of the same act. *Chandler v. Lee*, 349.
7. *IDEM.*—It is the duty of courts to execute laws according to their true intent and meaning; and that intent, when collected from the whole and every part of the act, must prevail over the literal sense of the terms, and control the strict letter of the law, when the letter would lead to possible injustice, contradiction, or absurdity. *Id.*
8. "GENUINENESS" OF AN INSTRUMENT.—The genuineness of an instrument in writing goes to the question of its having been the act of the party, just as represented; or, in other words, that the signature is not spurious, and that nothing has been added to or taken from it, which would lay the party signing or changing the instrument liable for forgery. *Cox v. N. W. Stage Co.*, 376.
9. PRACTICE.—A failure by plaintiff to deny, by affidavit, the genuineness and due execution of an instrument in writing set forth in the answer as the foundation of the defense, does not preclude the plaintiff from showing, on the trial, that it was procured by fraud or misrepresentation. *Id.*
10. In construing statutes, words are to be understood in their general signification; and when any doubt arises, although the doubt attaches only to a particular clause, the whole act is to be taken and examined together, in order to arrive at the true legislative intent. *People v. Owyhee M. Co.*, 409.
11. Neither courts nor assessors have any discretion in the construction of statutes, when their provisions and requirements are plain and easily understood. *People v. Owyhee Lumber Co.*, 420.
12. Statutes should be so construed as to give force and effect to each and every part thereof, if it is possible to do so. *People v. Hunt*, 433.
13. SUNDAY LAW—POLICE.—The act for the better observance of the Sabbath day, approved January 8, 1873, is a mere police regulation. It does not interfere with any vested rights acquired before its passage, and is a valid law. *People v. Griffin*, 476.
14. When we know the reason which alone determined the will of the law-makers, we ought to interpret and apply the words in a manner suitable and consonant to that reason, and as will be best calculated to effectuate the intent. *Greathouse v. Heed*, 494.
15. *IDEM.*—The prior state of the law will sometimes furnish the clue to the real meaning of the ambiguous provision of a statute. *Id.*
16. JURISDICTION.—Before a court, clothed with jurisdiction of a person or subject-matter, can be ousted of it by the creation of another forum, having the same power, the grant of jurisdiction to the latter must contain words of exclusion. *Id.*
17. PROVISIO.—A proviso in a statute is to be strictly construed. Its province is not to enlarge or change the purpose of the enacting clause; and its terms may be limited by the general scope of the enacting clause to avoid repugnancy. *Id.*
18. *IDEM.*—It is a maxim of interpretation that, in ambiguous things, such a construction is to be given to a statute, that what is inconvenient and absurd is to be avoided. *Id.*
19. PROVISIO.—Some effect should be given to a proviso in a statute, if possi-

sible; but if, by doing so, the manifest intention of the act, as gathered from its general scope and the circumstances connected with its passage, will be defeated; or, should the meaning of the proviso be such as to leave the court in doubt respecting its aim, then there is no alternative but to reject it as of no validity. *Id.*

20. NATIONAL BANK ACT—STATE—TERRITORY.—The word “state,” wherever used by congress in the currency act of 1864, or in the amendments thereto, should be construed to mean “territory” as well, wherever the same is applicable. *People v. Moore*, 504.
21. Congress did not intend, by the first proviso of the forty-first section of the national currency act of 1864, to require uniform taxation in all the different municipalities of a state or territory, but only that the same should be uniform in the municipality or subdivision in which the bank is located, or in which the shareholder resides. *Id.*
22. CONSTRUCTION—PLACE OF TAXATION.—The limitation as to the place of taxation of bank shares, contained in the national currency act of 1864, and in the act of 1868, amendatory thereof, requiring the assessment to be made “at the place where the bank is located, and not elsewhere,” must be construed to mean the state within which the bank is located. *Id.*
23. REVENUE LAW—TAXATION—BANK SHARES.—The revenue law in force in 1871, did not authorize the assessment or taxation of shares of national bank stock in the hands of individuals or corporations. *Id.*
24. INDIAN TRIBES—TRADE AND INTERCOURSE.—It was by virtue of the act of congress of June 5, 1850, and not the act of June 30, 1834, that the law regulating trade and intercourse with the Indian tribes east of the Rocky mountains, or such provisions of the same as were applicable, were extended over the Indian tribes of Oregon. *Pickett v. United States*, 523.
25. Acts of the legislature are not to be construed retrospectively, so as to take away vested rights, although they may alter or modify the remedy, nor can a healing act affect existing judgments. *People v. Moore*, 662.
26. The maxim that *expressio unius est exclusio alterius* is to be applied to the interpretation of statutes, as well as to contracts. *People v. Goldman*, 714.
27. Remedial statutes are to be construed to prevent a failure of the remedy, and extended to later provisions by subsequent statutes. *Utah & N. R. Co. v. Crawford*, 770.
28. EXEMPTION FROM TAXATION.—Subdivision 2 of section 39 of the revenue act applies to all statutory exemptions from taxation. *Id.*
29. CORPORATION—CONDITION PRECEDENT.—If section 1 of an act of the legislature declare certain persons therein named to be a corporation, and in a subsequent section require such corporation, within a certain time thereafter, to give a bond, the giving of such bond is not a condition precedent to the investment of the persons so named with corporate rights and power. *Boise City Canal Co. v. Pinkham*, 790.

SUMMONS.

JUDGMENT—EXECUTION.—A summons to A., B., C., or D. is a nullity, inasmuch as it is in the alternative, and not to all, nor to either of them. A judgment and execution, upon such summons, are likewise void, for want of jurisdiction of the defendants. *Alexander v. Leland*, 425.

SUPREME COURT.

1. **CERTIFYING CAUSES INTO.**—The provisions of section 326 of the civil practice act, authorizing the district court to certify questions of law to the supreme court for decision, apply to civil cases only. *People v. Farrell*, 49.
2. A party can not avail himself of a defense for the first time in the appellate court. *Smith v. Sterling*, 128.
3. **JURISDICTION.**—After a criminal case has been certified back to the district court, the supreme court has no longer any jurisdiction over it, but all necessary orders must be made by the court to which it has been certified. *People v. Walters*, 274.
4. **JUDICIAL NOTICE.**—This court is bound to take notice of the long-established and well-known usages of the country. *People v. Owyhee Lumber Co.*, 420.

SURETIES.

1. The sum set opposite the names of the respective parties subscribing a bond joint and several by its terms, is intended to show the sums for which they intend to justify and to fix their liabilities towards each in the event of the collection of the penalty. *People v. Slocum*, 62.
2. **LIABILITY.**—Sureties on an undertaking for the appearance of a party to answer to a criminal charge can only be held responsible in default of the appearance of the principal, in the event an indictment should be found for the particular offense set forth in the undertaking. *People v. Sloper*, 158.
3. **UNDERTAKING FOR INJUNCTION—JUSTIFICATION.**—Under our statute, in a bond or undertaking for an injunction for two thousand dollars or less, a surety can not justify in a sum less than that named as a penalty in the bond or undertaking. *Dangel v. Levy*, 722.

TAXES AND TAXATION.

1. **REVENUE LAW—TAX—DEBT.**—A tax levied or authorized by the territorial legislature, is a debt within the meaning of the act of congress authorizing the issue of legal tender treasury notes. *Haas v. Misner et al.*, 170.
2. **STATUTE.**—A territorial statute requiring the payment of taxes in any other than lawful money, at par, is void as being in conflict with the act of congress, of February 25, 1862. *Id.*
3. **TAXES ARE PAYABLE** in the legal currency of the United States, at its face value. *Crutcher v. Sterling*, 306.
4. **COLLECTORS OF.**—The tax collectors of the several counties in the territory have no right to demand the payment of taxes in gold coin, or in anything but the legal currency of the United States at its par value; and they must pay over the same kind of funds received by them. *Id.*
5. **IMPROVEMENTS—PUBLIC LANDS.**—Improvements upon public lands, as also the possessory right thereto, are taxable. *Quivey v. Lawrence*, 313.
6. **ASSESSMENT—PUBLIC LANDS.**—The assessment of land is a prerequisite which can not be dispensed with. It is the basis upon which all subsequent proceedings rest. For the purpose of defeating a tax deed, evidence may be given that the land was not assessed, or that it is public land. *Id.*

7. **TAX SALE.**—If the improvements on land be assessed and taxed, a sale of the land for such tax is void. *Id.*
8. **INJUNCTION.**—The purpose of section 3 of the revenue act, making the taxes a lien on the property, and declaring that it shall not be removed until the taxes are paid, is to secure the payment of the taxes. If the payment of a judgment for taxes is secured by an undertaking on appeal, an injunction ought not to be granted to prevent the removal of the property. *People v. Preston*, 374.
9. **ASSESSMENT—POSSESSORY TITLE—IMPROVEMENTS—PUBLIC LAND.**—It is proper to list and assess a mill-site and the immovable improvements upon public land, as real estate; but movable property situated thereon, such as a blacksmith shop, retort-house, barn, carpenter shop, and the like, must be listed, assessed, and taxed as personal property. *People v. Owyhee M. Co.*, 409.
10. **ASSESSMENT.**—The four classes of property mentioned in the revenue law as subject to taxation, are to be listed, set down, and valued separately in the assessment roll. *Id.*
11. **ESTOPPEL—ASSESSMENT.**—The owner of property subject to taxation is not estopped from disputing the correctness of the descriptions of property listed and given in by him under oath to the assessor. *Id.*
12. **ASSESSOR.**—The assessor is not bound by the valuation placed upon real or personal property by the owner thereof. The assessor is responsible for the correctness of descriptions of property assessed by him. *Id.*
13. **PUBLIC LANDS.**—No law of the territory can authorize the sale of the lands of the United States for taxes; such a sale would be void. *Id.*
14. **ASSESSMENT.**—In order to be valid, an assessment of property for taxation must substantially conform to the requirements of the revenue law in respect to the classification of the property. If it does not so conform it is void. *Id.*

See ASSESSMENT, 6.
15. **ASSESSMENT—ASSESSOR.**—Where an assessor fails to discriminate between improvements where the owner thereof is also the owner of the land upon which the same are situated, and those cases where the improvements are upon public lands, this court can not arrive at the conclusion that a want of such discrimination did not mislead him in assessing the property, as to value. *People v. Owyhee Lumber Co.*, 420.
16. **ASSESSMENT.**—When the aggregate of a column of figures is preceded by a dollar mark, the result must follow that each item of such column is also dollars, although not preceded by such mark; and this, on the well-established maxim in mathematics, that the whole is equal to all its parts. *Id.*
17. **NATIONAL BANK SHARES.**—When congress enacted the currency act of 1864, it intended to permit the shares in national banks, in the hands of individuals or corporations, to be taxed, wherever such associations might be organized, whether in states or territories. *People v. Moore*, 504.
18. **ASSESSMENT.**—If real estate and personal property have been assessed in a doubtful or disputed territory by two counties, the tax may be paid in the county where the land is actually located, and such payment will bar an action brought for the taxes in the other county. *People v. Wilkerson*, 619.
19. **LEGISLATIVE POWER—ASSESSMENT.**—It is competent for the legislature

to provide for the assessment and collection of taxes by either of two counties in a disputed or doubtful district, when it is left optional with the taxpayer to pay the taxes in the county where the land is actually situated. *Id.*

20. **IDEM—DEFENSES.**—It is also within the power of the legislature to define by law the grounds upon which a party sued for his taxes may set up a defense. *Id.*
21. **BLENDING TAXES.**—The blending together of the several different kinds of taxes, in an assessment roll, invalidates the entire tax. *People v. Moore*, 662.
22. **SUITS FOR TAXES—COSTS.**—In a suit for taxes, although the defendant recovers, the judgment should be general, without costs. *Id.*
23. **EXEMPTION FROM.**—Subdivision 2 of section 39 of the revenue act applies to all statutory exemptions from taxation. *Utah & N. R. Co. v. Crawford*, 770.

TENANTS IN COMMON.

JOINT LIABILITY—JUDGMENT.—Action against T. and S. for the foreclosure of mechanic's lien. The work was performed between the second of August, 1863, and the thirtieth of November, 1865. The defendants were tenants in common of the incumbered premises at the time of commencing this suit: *Held*, 1. That if the defendants were liable at all to the plaintiff, L., they were jointly, and not jointly and severally, liable; and, 2. That a separate personal money judgment could not be entered against one of the defendants, by default. *Lowe v. Turner*, 107.

TERRITORY.

1. **COSTS.**—In no event could this court render judgment against the territory for costs, their being no mode of enforcing it, or process by which it could be made effective. *Beachy v. Lamkin*, 50.
2. **REPUDIATION.**—The territory can no more repudiate and refuse to pay her debts than a private individual. *Lamkin v. Sterling*, 92.
3. **CLAIMS AGAINST THE—LIMITATION.**—Claims against the territory must be presented to the controller, with the evidence in support thereof, within two years after the same have accrued. *Crutcher v. Cram*, 372.
4. **EVIDENCE IN SUPPORT OF CLAIMS.**—The certificate of the prison commissioner to a claim against the territory, that the account is correct, and is due from the territory, is merely the evidence in support of such claim. *Id.*
5. **TERRITORIAL GOVERNMENT.**—It appears to have been the policy of the general government to assimilate the new territories as nearly as possible to the states. *People v. Heed*, 402.

TIME.

If there was no law defining the crime and imposing a penalty at the time the offense is alleged in the indictment to have been committed, time is material, and the indictment should be set aside. *People v. Williams*, 85.

TOWN SITE ACT.

1. **EQUITY—ACTION.**—An action under the town site act to settle the rights of parties to enter lots in such town site, assimilates more to a suit in equity to quiet title than to any other form of action. *Forsythe v. Richardson*, 459.

2. **PARTIES.**—In an action to settle rights under the town site act, the mayor of the city is not a necessary party. *Id.*
3. **MAYOR'S DEED.**—An applicant for a mayor's deed, for lots in a town site, entered under the act of congress, must set forth in his application all the facts necessary to entitle him to such deed, as required by the territorial law. *Greathouse v. Heed*, 482.
4. **TOWN LOTS—OCCUPANCY.**—In order to entitle a person to a deed for lots or lands in the city of Lewiston from the mayor of the city, he must be an occupant thereof, and the occupancy must consist of an actual residence thereon according to its legal subdivision into lots, blocks, etc.; an inclosure of the subdivision or a part thereof, or some permanent improvement thereon at the time of his application for the deed. *Thompson v. Holbrook*, 609.
5. **IDEM—OCCUPANCY.**—An occupancy of one legal subdivision does not draw to it another legal subdivision, though contiguous to or immediately adjoining it. *Id.*
6. **IDEM—IMPROVEMENTS—ABANDONMENT.**—If a person has at one time been an occupant of a lot within the meaning of the law, by erecting an inclosure around it, but before his application for a deed has suffered such inclosure to be destroyed by freshets or taken away by tenants, so as to leave the lot open to the public, he shall be deemed to have abandoned it, and another person may enter thereon and become an occupant, so as to entitle him to a deed from the mayor. *Id.*

TRANSCRIPT ON APPEAL.

PRACTICE—AFFIDAVITS—CERTIFICATE.—Affidavits used on motions which are incorporated into a transcript on appeal must have the certificate of the judge or the clerk that they were the affidavits used on the hearing on the motion. *Goodman v. Minear M. & M. Co.*, 131.

TRESPASS.

1. **MINING LAW.**—If plaintiffs performed the acts required by law to locate a quartz claim, except the labor—the year not having expired—and the defendants undertook to take possession of the ground, they were trespassers. *Atkins v. Hendree*, 95.
2. **PUBLIC LANDS.**—It is no defense to an action or prosecution for trespass committed upon public land, that such land is the property of the United States. *People v. Maxon*, 330.

TRIAL.

1. **IN CASES OF TRIAL,** the plaintiff should recover such judgment as he shows himself entitled to under the pleadings and proof. *Lowe v. Turner*, 107.
2. **THE CODE** has denominated the hearing and disposing of questions or issues of law, trials. When, therefore, a cause is called to dispose of any issue, whether of law or fact, it is, in contemplation of section 191, called for trial, so far at least as to require all rulings of the court which it is desired to have reviewed in an appellate court incorporated into a bill of exceptions. *Lamkin v. Sterling*, 120.

UNDERTAKING.

1. **VARIANCE.**—The fact that a name appears in the body of a bond that is not subscribed to it, or that some or all the names subscribed to such bond do not occur in the body of the same, does not in the least affect the liability of those who executed and delivered it. *People v. Bugbee*, 88.
2. **ERASURES—INTERLINEATIONS.**—Erasures and interlineations appearing in an obligation at the time of its signing can not in any manner affect the liability of the subscribing parties. *Id.*
3. **BOND WAS EXECUTED** and delivered into the custody of the clerk of the court in which the defendant was to appear; the parties executing such bond as sureties took and subscribed a justification on such bond, which was administered by the judge of the court, and was by him approved at the time: *Held*, from the facts the court very properly found that the signatures were genuine, and that the execution of such bond was sufficiently proven. *Id.*
4. **THE GENERAL RULE** is well settled that an undertaking taken for a purpose not authorized by statute is void. *People v. Sloper*, 158.
5. **THE UNDERTAKING** need not set out the offense charged with the same technical particularity required in an indictment, but it will be sufficient if the offense be substantially described. *Id.*
6. **IDEM.**—If a recognizance undertake to recite a specific charge, a charge must be recited for which an indictment will lie. *Id.*
7. **SURETIES—LIABILITY.**—Sureties on an undertaking for the appearance of a party to answer to a criminal charge can only be held responsible in default of the appearance of the principal, in the event an indictment should be found for the particular offense set forth in the undertaking. *Id.*
8. **PLEADING—COMPLAINT—RECOGNIZANCE.**—An allegation in a complaint, that “a recognizance was made and duly delivered” must be held to mean that it was returned to the clerk of the court, as required by law; and such allegation is sufficient. *People v. Myers*, 356.
9. **TITLE—RECOGNIZANCE.**—The “people of the territory of Idaho” and “the people of the United States in the territory of Idaho,” are substantially the same; hence, a recognizance executed to “the people of the territory of Idaho” is a substantial compliance with section 503 of the criminal practice act, and an action may be maintained thereon, in the name of the people of the United States in the territory of Idaho. *Id.*
10. **APPEAL—PRACTICE.**—If an undertaking on appeal is filed before the notice of appeal is filed and served, the appeal will be dismissed on motion. *People v. Hunt*, 371.
11. **ON APPEAL.**—An undertaking on appeal from a judgment in the sum required by law upon a single appeal, does not make effectual an appeal from an order refusing a new trial, although taken at the same time and by the same notice. *McCoy v. Oldham*, 465.
12. **INJUNCTION.**—An undertaking for an injunction is sufficient without the signature of the plaintiff in the action. *Pence v. Durbin*, 550.
13. **ON APPEAL.**—The undertaking on an appeal must be filed within five days after the service of the notice of appeal, unless a deposit of money be made instead, or the undertaking be waived by the adverse party, in writing. *Anderson v. Knott*, 626.
14. **IDEM.**—If the undertaking on appeal is filed before the notice of appeal

is served, the appeal is not effectual for any purpose, and it must be dismissed. *Clark v. Lowenberg*, 654.

15. **DISMISSAL OF APPEAL.**—If an appeal is taken from the judgment, and also from an order refusing a new trial, and an undertaking is given "on such appeal" without stating upon which appeal it is given, the appeals will be dismissed for want of a proper undertaking. *Mathison v. Leland*, 712.
16. **APPEALS.**—When two appeals are taken, one from the judgment, and the other from an order refusing a new trial, there should be two undertakings in order to render both appeals effectual. *Id.*
17. **BOND—LIABILITY.**—The affixing of the sum of one thousand dollars between the signature and the seal of the obligor to a bond, the penalty of which is two thousand dollars, will not have the effect to limit his liability to one thousand dollars. *Dangel v. Levy*, 722.
18. **FOR INJUNCTION—JUSTIFICATION OF SURETIES.**—Under our statute in a bond or undertaking for an injunction for two thousand dollars or less, a surety can not justify in a sum less than that named as a penalty in the bond or undertaking. *Id.*
19. **ALTERATION OF.**—When, in an undertaking for two thousand dollars, the figures one thousand dollars entered between the signature and seal of one of the sureties, were erased after it was signed by him; this was no fraud upon any other surety who signed the undertaking after the erasure. *Id.*
20. **FOR INJUNCTION—ERASURE IN.**—Where an undertaking for an injunction was executed and delivered after an erasure had been made, it can not be presumed that the obligee was a party to such alteration or erasure. *Id.*

VARIANCE.

1. **PROOFS.**—It is considered no variance from the proof if the facts show a substantial right to recover under the allegations, and the necessity of having various forms of stating the same cause of action is thus fully obviated. *People v. Slocum*, 62.
2. **BOND.**—The fact that a name appears in the body of a bond that is not subscribed to it, or that some or all the names subscribed to such bond do not occur in the body of the same, does not in the least affect the liability of those who executed and delivered it. *People v. Bugbee*, 88.
3. **INDICTMENT—PROOF.**—If in an indictment for larceny the property is alleged to be that of W., but on the trial be proven to be that of W. & Co., consisting of W. and another person, the variance is fatal. *People v. Frank*, 200.

VENDOR'S LIEN.

1. **SPECIAL PERFORMANCE.**—A decree for a specific performance in a suit brought to enforce a vendor's lien, can not be upheld. *Hawkins v. Thurman*, 598.
2. **SECURITY.**—A vendor's lien can not be enforced for the purchase money of a tract of land, when the parties have stipulated in their contract for other security. It is only in cases where no security is taken, except that which the law gives, that a vendor's lien attaches to the land. *Id.*

VERDICT.

1. **IMPEACHING—AFFIDAVIT OF JUROR.**—The verdict of a jury may not be impeached by the affidavit of a juror. *Jacobs v. Dooley*, 41.

2. **CRIMINAL LAW—JUDGMENT.**—On an indictment for an assault with intent to commit murder, when any less grade of offense is found by the jury, the verdict must show the character of the offense so found, and the judgment must not exceed that warranted by the verdict. *People v. Cozad*, 167.
3. **PRACTICE—ADMISSIONS.**—The omission of the jury to find by their verdict, the amount due, when that question is not in controversy, does not deprive the prevailing party of his right to a judgment for the sum admitted to be due by the pleadings. *Betts v. Butler*, 185.
4. **WEIGHT OF EVIDENCE.**—When there is some evidence to sustain each of the material questions upon which a jury is bound to find in order to support a verdict, this court ought not to disturb the verdict, even if the court would have found differently on any or all of the issues. *Cox v. N. W. Stage Co.*, 376.

See PRESUMPTION, 10.

5. **NEW TRIAL.**—After two concurring verdicts, the court will not grant a new trial if the questions to be tried wholly depend upon matters of fact, and no rule of law has been violated; even though in the opinion of the court the verdict be against the weight of evidence. *Monarch G. & S. M. Co. v. McLaughlin*, 650.
6. **JURY—IRREGULARITY.**—No irregularity in drawing, summoning, returning, or impaneling trial jurors is sufficient to set aside a verdict, unless injury results, nor unless the objection is made before verdict. *People v. Ah Hop*, 698.

VERIFICATION.

1. **WHEN THE COMPLAINT IS NOT VERIFIED,** the answer need not be verified. *People v. Hunt*, 433.
2. **ANSWER—DENIALS.**—When the complaint is verified, the answer must deny, specifically, every material allegation of the complaint, but need not traverse mere matters of surplusage. *Pence v. Durbin*, 550.
3. **DEFECTIVE—MOTION TO STRIKE OUT.**—An answer can not be disregarded because of a defective verification. A judgment rendered on the pleadings upon the grounds of such defect is erroneous. The only proper mode of reaching such a defect is by a motion to strike out. *Id.*
4. **A VERIFICATION OF A PLEADING** made by a person not a party to the action is sufficient if it shows any statutory reason why it is not made by a party to the action. *Id.*

WAIVER.

See APPEARANCE, 1; CRIMINAL LAW AND PRACTICE, 1.

1. **NOTICE OF APPEAL.**—A party appearing generally in a case on appeal in this court, thereby waives all informalities in the notice of such appeal or want of service of the same. *Moore v. Koubly*, 55.
2. **PRACTICE—EXCEPTIONS—ASSIGNMENT OF ERRORS.**—All exceptions taken in the court below will be treated as waived, unless the matters so excepted to are assigned as error in this court. *Purdy v. Steel*, 216.
3. **ACQUIESCENCE—PRESUMPTION.**—What has been done and long acquiesced in until the rights of third parties have grown up thereunder, should be presumed to have been rightly done. *Hazard v. Cole*, 276.
4. **ANSWER.**—An answer by a party, after the overruling of his demurrer,

waives all defects in the complaint, except those which may properly be taken advantage of on a motion in arrest of judgment. *Pence v. Durbin*, 550.

5. A failure to give notice of intention to move for a new trial or to file the statement within the time required by law, or such further time as the court or judge may, by order, grant, is a waiver of the right to move for a new trial; and the failure can only be remedied by the appearance of the opposite party without objection to such defects, at the settlement of the statement or on the hearing of the motion. *Stevens v. N. W. Stage Co.*, 604.
6. TENDER.—A tender of cattle upon a contract, within the time specified, is waived by a subsequent acceptance of them upon the contract. *Emery v. Langley*, 694.
7. If a defendant does not insist upon the mere formalities of the law in the court below, he will be deemed to have waived them. It is too late to take advantage of them for the first time in this court, on appeal. *People v. Ah Hop*, 698.

WATERCOURSE.

DAMAGES—POSSESSION OF LAND.—The lawful possession of land is all that is required to enable a plaintiff to recover damages for building a dam across a watercourse running through such land, by reason whereof the water is thrown back upon the land of plaintiff. *Norris v. Glenn*, 590.

WILL.

REVOCATION OF.—Whenever new moral and testamentary duties arise subsequent to the execution of a will, the will is revoked by presumption or operation of law, unless the objects of those duties are provided for, either by the law or the will. *Morgan v. Ireland*, 786.

WITNESS.

1. IMPEACHMENT.—The rule for the introduction of evidence to contradict a witness is as follows: If the fact to which the contradiction applies is material to the issue, he may be contradicted; but when it is immaterial and not within the issue, contradictory evidence can not be introduced. *People v. Stock*, 218.
2. PLACE OF TRIAL—VENUE.—The convenience of witnesses residing in a neighboring state will not entitle a party to a change of the place of trial. *Shirley v. Nodine*, 696.

WRIT OF ERROR.

1. A writ of error is the proper mode of bringing before this court, for review, actions at law; and suits in chancery must be brought up by appeal. *U. S. v. Gilson*, 364.
2. A common law action can not be re-examined in this court on appeal, but must be brought up by writ of error. *Id.*
3. PARTIES.—A writ of error may be sued out, under the statute, by one or more of several defendants, without joining their co-defendants in the writ. *Alexander v. Leland*, 425.

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